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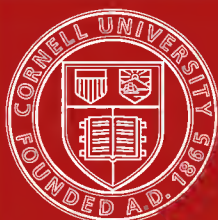
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REPORTS OF CASES
DETERMINED
IN THE
DISTRICT COURTS

OF THE
State of California

BY HENRY J. LABATT,

COUNSELOR AT LAW.

VOLUME 1.

SAN FRANCISCO.
WHITTON, TOWNE & CO., PRINTERS, 151 CLAY STREET.
1857.

M 737

Entered according to Act of Congress, in the year of our Lord 1858,

By HENRY J. LABATT,

In the Clerk's Office of the District Court, for the Northern District of California.

ERRATA.

Page two, fifth line, for "plaintiff" read defendant.

Page six, thirteenth line, for "notice" read virtue.

Page forty, eighth line, for "said" read void.

Page fifty, twenty-eighth line, for "casement" read easement.

Page one hundred and six, twenty-third line, for "occurred" read accrued.

Page one hundred and six, twenty-fifth line, for "va ied" read barred.

Page two hundred and twenty-seven, nineteenth line, for "payment" read judgment.

Page three hundred and fifteen, first line, for "1857" read 1851.

P R E F A C E.

In preparing this volume and offering it to the profession, the reporter has had in view the sole object of transferring from one District to another the opinions of the Hon. Judges upon causes, which have been adjudicated before them, in the belief that they will effect a uniform system in the State.

Many recommendations have been received, and the reporter hopes by attention and care, to make material improvements in the succeeding volumes.

He feels thankful to those judges and the members of the profession, who have materially assisted him.

HENRY J. LABATT.

SAN FRANCISCO, December, 1857.

JUDGES OF THE DISTRICT COURTS

OF THE STATE OF CALIFORNIA.

FIRST DISTRICT—HON. BENJAMIN HAYES, *San Diego*.

SECOND DISTRICT—HON. JOAQUIN CARILLO, *San Luis Obispo*.

THIRD DISTRICT—HON. CRAVEN P. HESTER, *San Jose*.

FOURTH DISTRICT—HON. JOHN S. HAGER, *San Francisco*.

FIFTH DISTRICT—HON. CHARLES M. CREAMER, *Stockton*.

SIXTH DISTRICT—HON. CHARLES T. BOTTS,^{a)} *Sacramento*.

SEVENTH DISTRICT—HON. E. W. MCKINSTRY, *Napa*.

EIGHTH DISTRICT—HON. J. M. PETERS, *Trinidad*.

NINTH DISTRICT—HON. WM. P. DAINGERFIELD, *Shasta*.

TENTH DISTRICT—HON. WM. BARBOUR, *Marysville*.

ELEVENTH DISTRICT—HON. JOHN M. HOWELL, *Coloma*.

TWELFTH DISTRICT—HON. EDW. NORTON, *San Francisco*.

THIRTEENTH DISTRICT—HON. EDWARD BURKE, *Mariposa*.

FOURTEENTH DISTRICT—HON. NILES SEARLS, *Downieville*.

FIFTEENTH DISTRICT—HON. C. E. WILLIAMS, *Weaverville*.

a) Appointed to fill the vacancy caused by the resignation of Hon. A. C. Monson.

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LABATT'S

DISTRICT COURT REPORTS.

STATE OF CALIFORNIA.

FOGARTY vs. FINLAY.

Twelfth Judicial District Court, March, 1857.

WRITTEN INSTRUMENT SET FORTH IN ANSWER—NOTARIAL BOND— AMENDMENT.

When suit is brought by a mortgagee against a Notary on his bond for an informal acknowledgement to a mortgage whereby the mortgagee lost his lien, if the Notary plead a release the defendant must deny the validity of the release as a forgery, under oath, by an affidavit filed in the cause.

If the execution of the release is not so denied, under oath, then the release is a complete bar to the action.

The Court will allow the plaintiff to withdraw a juror and amend by filing an affidavit afterwards, on a proper ground of surprise.

Hoge & Wilson, for plaintiff.

Sheppard & Woodyard, and *C. V. Grey*, for defendant.

This action was brought by Fogarty against Finlay, a notary, and his sureties on the notarial bond, for negligence and want of skill in the acknowledgement of a mortgage wherein his rights were prejudiced by a subsequent incumbrance declared to have priority because of the defective certificate of acknowledgement to the mortgage made by Finlay.

The complaint contained the usual counts.

The answer contained several defenses, among others, that the debt

In Re Waldron.

secured by mortgage had been paid, satisfied and discharged, as appeared by a release, a copy of which was annexed to the answer.

The plaintiff failed to deny, under oath, the execution of this release, but on the trial claimed that it was a forgery and offered to prove it, and contended that the plaintiff did not so plead the release as to require a denial of its execution under oath, and also offered to prove that it was not paid and that the release had never been delivered to the mortgagor, and that the mortgagor never had possession of it.

The plaintiff also demurred *ore tenus* to the second defense, because it did not go to the cause of action, but to the damages, and was a plea of *non damnificatus*, which was only good in actions on bonds of indemnity while a notarial bond was not such.

Judge Norton held that he had grave doubts as to whether the instrument was pleaded in such a manner as to require a denial under oath, that is, whether it was pleaded as a release or whether the defense was merely payment, and the instrument only vouched in proof of it, but ultimately decided that this plea of the written instrument was sufficient against the plaintiff and that if he sought to deny its genuineness or execution, he should file his affidavit to that effect.

The Judge also ruled, that the release, if not denied by affidavit filed, was a sufficient bar to the action.

These rulings appearing to work a surprise upon the plaintiff, the Court permitted a juror to be withdrawn and the cause continued with leave to file an affidavit contesting the genuineness of the release.

IN RE WALDRON.

Twelfth Judicial District Court, April, 1857.

ORDERS OF ARREST—THE NATURE OF ACTION TO BE SET OUT IN WRIT.

The validity and sufficiency of the affidavit on arrest cannot be examined on *habeas corpus*.

The order of arrest is defective which does not state with sufficient certainty the cause of action, to show that it was a case in which an arrest is allowed by law.

Messrs. Wells, Fargo & Co. instituted an action in the Fourth District Court against Isaac Ferris Waldron, to recover \$651, money received by him while acting as clerk in their office, and which sum, it

In Re Waldron.

is alleged, he converted to his own use. An order of arrest was issued, and the defendant taken into custody by the Sheriff. Subsequently another suit was commenced for the same cause of action, the first being discontinued, and a second order of arrest granted. Bail, on each occasion, was fixed at \$6,000. Waldron was, however, indicted by the Grand Jury, and held in confinement, as well under the order of arrest in the civil action, as by a bench warrant from the Court of Sessions. A motion was made and argued before Judge Hager, of the Fourth District Court, to vacate the order of arrest, on the ground that as the first was illegal, acknowledged by plaintiffs in discontinuing their first suit, by reason of informality at its reception, no other arrest could be made for the same cause of action. The Court refused to grant the motion, because the defendant was held by the Sheriff on a bench warrant, on a criminal charge. Since then, Waldron has given bail to answer the several indictments found against him, and his counsel had him brought up before Judge Norton, of the Twelfth District Court, to be discharged on habeas corpus, on other grounds, looking towards defects in the order of arrest issued out of the Fourth District Court.

A number of points were discussed as to the illegality of the writ (the ordinary one used in the Clerk's office,) and the manner of its issuance, and administering the oath to the affidavit on arrest.

George F. James, for motion.

Gregory Yale, opposing.

NORTON J.—“ This is an application on habeas corpus to be discharged from arrest. Many of the objections to the arrest in the civil action, are directed against the validity and sufficiency of the affidavit on which the order was granted. But these are matters which cannot be examined on habeas corpus. By one of the provisions of section twenty of the habeas corpus Act, where a party has been committed on a criminal charge, inquiry may be made so far as to ascertain if there was reasonable or probable cause for the commitment ; but where it appears from the return to the writ of habeas corpus that the party is held by virtue of process issued in a civil action, the only inquiry can be as to the sufficiency of the process on its face, and the juris-

In Re Waldron.

diction of the officer to issue the process in the case specified. Section fifteen authorizing facts to be alleged showing the imprisonment to be unlawful, is probably intended to apply to other cases than those provided for in section twenty, where the party is held by civil process, and certainly does not authorize a mere review of the errors committed by another judge or court, and perhaps a superior court, in deciding upon the competency or sufficiency of the evidence produced to him in a case of which he had unquestioned jurisdiction. The fact of a prior arrest, sought to be shown in this case, does not reach the jurisdiction of the judge to issue a second order, but is a matter addressed to his judgment or discretion in case the second action appeared to be vexatious. But I think the order in this case is, on its face, defective in substance for not stating the cause of action with sufficient certainty to show that it was a case in which an arrest is allowed by law. That this should be shown, seems to be required as the result of the provisions of the habeas corpus Act, and is according to the settled principles of the common law. Blackstone says, (1 Com. 137,) 'to make imprisonment lawful, the warrant must express the cause of the commitment, in order to be examined into, if necessary, upon a habeas corpus. If there be no cause expressed, the gaoler is not bound to detain the prisoner.' All that appears on the face of this order upon this point, is: that an action has been commenced and that the case is one of those *mentioned* in section seventy-three of the Practice Act. But the Supreme Court have decided, in the case of Prader, that in at least one of the cases mentioned in this section, a party cannot by law be arrested. The order, therefore, may have been issued in a proper case and it may not. This is not sufficient. It should appear that it in fact was issued in a case in which the court or judge had jurisdiction to order an arrest. It is said it should be presumed that the judge issued the order in one of the cases in which he was authorized to issue it. But if any presumption could be resorted to in a case involving the citizen's right to his liberty, it would in this case, to use familiar language, be begging the whole question, for if this were so, any order issued by any officer who had authority to order an arrest in any case would be valid if it simply recited in general terms that it was issued in a case in which the officer was authorized by law to order an arrest. This would

Penniman vs. Fiske.

annul the twentieth section of the habeas corpus Act. It is again said the affidavit shows that the case was one which authorized the order, but if we cannot go behind the order and examine the affidavit for the prisoner's benefit, we cannot do the same thing for his prejudice. The order is the only authority which the Sheriff alleges for detaining him.

"The error in this case arose from using a printed form which was prepared before the decision above alluded to, and which, if ever sufficiently definite, is not valid now.

"The prisoner having given bail on the criminal charge, and the order of arrest in the civil action being invalid, he is entitled to his discharge."

PENNIMAN vs. FISKE.

Twelfth Judicial District Court, April, 1857.

SLANDER.

The words, "he would steal," are not, per se, actionable.

Demurrer to second count of the complaint.

G. F. & W. H. Sharp, for plaintiff.

Crockett & Page, for defendant.

The second count of the complaint averred that defendant had said of the plaintiff that, "he would steal," and alleged the inuendo that plaintiff had been guilty of larceny.

Judge Norton held that the above words were not, per se, actionable inasmuch as they did not fix the crime of larceny, but merely intimated that the plaintiff was not too good to steal, or would steal if he had a chance.

It differs materially from the case wherein the actionable words were: "The plaintiff will steal, and I can prove it." These words, "I can prove it," inferred a commission of such larceny, inasmuch as there was proof to the act; but, in the present case, the allegation inferred a mere conjecture, and, as such, was not actionable.

Demurrer sustained with leave to amend.

Meyer vs. Scannell, Sheriff. — Folger vs. His Creditors.

MEYER vs. SCANNELL, SHERIFF.

Fourth Judicial District Court.

SURETY ON BOND.

A party in interest, if not a party of record, may be a surety.

Motion upon an exception to a surety on the ground of immediate interest.

Labatt, for plaintiff.

Pixley & Smith, for defendant.

This was a motion to show cause why one Tobias Shaw, a surety on a replevin bond, should not be held incompetent on the ground that he was the person in interest against whom the suit was brought.

It appeared on the examination before the Clerk, that Shaw had attached the goods of one Morris & Danzieger, and by notice of that attachment the Sheriff had taken possession of goods claimed by this plaintiff.

This suit was brought in replevin to recover the possession of the goods taken under that attachment.

Shaw became a surety on bond under Sec. 104 of the Civil Practice Act, and the motion was made on the ground of his incompetency.

Judge Hager held that inasmuch as he was not a party to the record, his interest would not prevent him from being a surety in this case.

FOLGER vs. HIS CREDITORS.

Twelfth Judicial District Court, April, 1857.

ATTACHMENT LIEN—INSOLVENCY.

An attachment lien survives a surrender in Insolvency.

This was an application by the assignee of the Insolvent to have the Sheriff deliver over goods attached in a suit commenced against the Insolvent, prior to the filing of the petition in bankruptcy.

Meyer vs. Scannell, Sheriff.

G. F. & W. H. Sharp, and James A. McDougall, for the assignee and insolvent.

Whitcomb, Pringle & Felton, for the attaching creditor.

A suit having been brought against Folger and his property attached, Folger subsequently filed his petition in insolvency and his assignee sought to have the property thus previously attached delivered to him for the creditors in general, on the ground that no lien was created thereupon under the provisions of the statute in Insolvency.

Judge Norton held that a previous attachment lien survived the surrender and could be enforced against the specific property attached and was one of those liens provided for in the Insolvent law. He regarded the conflicting decisions cited on this point as referring to the U. S. Bankrupt law and not applicable to this case in question.

MEYER vs. SCANNELL, SHERIFF.

Fourth Judicial District Court, March, 1857.

HOUSEHOLDER.

A Householder, in the meaning of the statute, as a surety, is only a permanent resident and not necessarily the head of a family.

Motion on an exception to a surety on a replevin bond.

Harmon & Labatt, for plaintiff.

Haight & Haight, for defendant.

This was a motion to show cause why one Levi Strauss, a surety on a replevin bond, should not be held incompetent on the ground that he was not a householder, having justified as such.

It appeared on the examination before the Clerk, that Strauss had a store and slept in the same, but had no other residence and had no family.

Judge Hager held that householder here meant one who had a fixed residence in the county, and that the term householder was used in contradistinction to a transient resident.

Sacramento County vs. Rhodes & Maddux.

SACRAMENTO COUNTY vs. RHODES & MADDUX.

*Sixth Judicial District Court, July, 1856.*POWER OF THE BOARD OF SUPERVISORS TO PURCHASE STOCK IN PLANK
ROADS—VOID INSTRUMENTS.

The power given under the Act of 1855 to the Board of Supervisors of the several counties, to lay out, control and manage roads, &c., does not include the power to purchase roads already laid out by individuals or corporations.

The Board of Supervisors is the mere agent of the county, with limited power and jurisdiction, and can exercise no greater authority than has been delegated, and such as may be absolutely necessary to carry into effect the delegated powers.

The Supervisors have no power to purchase stock in a corporation and make the county stockholders.

Courts of equity may interpose their authority to order a cancellation or delivering up of written instruments void on their face.

Harmon, Sunderland & Stanley, for plaintiff.

Beatty, Robinson & Botts, for defendants.

The cause is fully reported in the decision of Judge Howell.

HOWELL, J.—By consent of parties the issues of fact herein were submitted to the Court for trial without the intervention of a jury, and from the evidence I find the following facts, to wit:

1st. That on the 15th day of September, 1855, the "Board of Supervisors of Sacramento county," acting for and on behalf of said county, entered into a contract with the defendant, John M. Rhodes, for the purchase of nine hundred shares of the capital stock of the "Sacramento Turnpike and Plank Road Company," a joint stock company incorporated under the provisions of the act of the 12th of May, 1853, for the consideration of twenty-six thousand dollars in the warrants of said county, drawn upon the general fund.

2d. That said contract is evidenced by the following instrument in writing and order of said Board, viz: "For and in consideration of the sum of twenty-six thousand dollars in warrants of the county of Sacramento to me in hand paid by the Board of Supervisors of said county, I have sold and transferred to said county nine hundred shares of the capital stock of the 'Sacramento Turnpike and Plank

Sacramento County vs. Rhodes & Maddux.

Road Company,' reserving, however, my proportions, to wit: three-fourths of all money in the hands of the Treasurer of said company.

SACRAMENTO, September 15th, 1855.

(Signed)

JOHN M. RHODES.

" PLANK ROAD, September 15th, 1855.—On this day comes J. M. Rhodes before the Board, and makes a transfer duly executed to the Board of Supervisors, on behalf of the county of Sacramento, of his entire interest in nine hundred shares of the capital stock of the 'Sacramento Turnpike and Plank Road Company,' reserving to himself three-fourths of all money now in the hands of the Treasurer of said company, for and in consideration of which said Board, on behalf of said county, agree to pay the said J. M. Rhodes the sum of twenty-six thousand dollars in warrants of the county of Sacramento. Wherefore it is ordered that the County Auditor be and he is hereby authorized to draw his warrant or warrants on the County Treasurer for the sum of twenty-six thousand dollars in favor of J. M. Rhodes, payable out of any money in the county treasury, not otherwise appropriated, belonging to the general county fund."

3d. That in pursuance of, and in accordance with the foregoing contract and order, the Auditor of said county drew and delivered to the said John M. Rhodes twenty-six warrants upon the County Treasurer, for one thousand dollars each, payable to the said Rhodes out of any money in the treasury belonging to the general county fund, not otherwise appropriated, and numbered from 480 to 505, and inclusive of said numbers; which said warrants were duly presented to the Treasurer of said county on the 15th day of September, 1855, and by him endorsed "not paid for the want of funds," and his name signed to said endorsement.

4th. That the capital stock of said "Sacramento Turnpike and Plank Road Company," is one hundred and twenty thousand dollars, divided into twelve hundred shares, of one hundred dollars each, and that the nine hundred shares purchased by the said Board, were then and there at the time of said purchase delivered to the said Board by the said John M. Rhodes, and were his property.

5th. That the term of office of said Board of Supervisors expired on the 30th day of September, 1855, and that the day before the

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expiration of their term, each member of said Board was elected a Director in said joint stock company, and each purchased a share of the stock of said company.

6th. Prior to the making of the contract of purchase, the Board met, and one of them estimated the revenue of the county for current expenses at from one hundred and twenty-two to one hundred and twenty-five thousand dollars, and another at one hundred and thirty-three thousand dollars. In this estimate they dated the fiscal year as commencing on the first Monday in May. This estimate was not placed on file, nor was there any record made of it. They at the same time made an estimate of the debts and liabilities of the county, salaries of county officers, &c., which added to the twenty-six thousand dollars purchase money, fall considerably short of the estimated revenues.

7. The witnesses for the plaintiff made the following estimates, viz :

The debts and liabilities created from Jan. 1st, 1855, to April 15th, 1855..	\$115,225 81
Debts and liabilities created from Jan. 1st, 1855, to May 1st, 1855.....	30,710 31
	<u>\$84,515 50</u>
Estimated annual expenses.....	85,000 00
Estimated expenses fixed by law, from Sept. 15th, 1855, to May 1st, 1856	53,124 99
To which add the.....	84,515 50
	<u>\$137,640 49</u>

8th. This estimate was taken from the records of the county, and is based upon receipts for the present and past years, and is as nearly correct as such estimates can be made.

9th. That petitions signed by about three hundred and fifty inhabitants of the county, were presented to the Board before the purchase, praying the establishment of a road on or near the same line now occupied by this road. That said road is embraced within the limits of Sacramento county—that large quantities of freight pass over this road for the supply of citizens in the eastern portion of the county, and that the toll charged for teams prior to the purchase was three dollars each, which has since been reduced to twenty-five cents each.

10th. That the county warrants of Sacramento county drawn upon the general fund were worth at the time of this purchase seventy cents on the dollar.

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11th. That the warrants received by the defendant, Rhodes, for the nine hundred shares of stock, were transferred by him to a third party before this suit, but for what purpose does not appear from the testimony, nor does it appear that the party to whom they were transferred had any other or further notice of the nature of the transaction than the warrants themselves would impart.

12th. That the defendant, Maddux, is the present Treasurer of Sacramento county, and as such has charge of the funds of the county and the books of his office, and that upon said books are registered in their regular order the warrants issued to the said John M. Rhodes, and the said Maddux declares that he will pay them in their regular order, unless restrained or prevented from so doing by competent authority.

13th. That no demand was made of the said Rhodes for said warrants prior to the institution of this suit, but all legal objections on account thereof, if any existed, were waived by the defendants on the trial.

My conclusion of law, based upon the foregoing facts are, that the contract for the purchase of said stock is absolutely void—that its invalidity is apparent upon its face, and upon the face of the warrants, and that the county has a complete defense at law, and that the relief sought cannot be granted upon the allegations in the bill, and the facts proven, and that the bill ought to be dismissed at plaintiff's costs, and it is dismissed accordingly.

J. M. HOWELL, District Judge.

The prayer of the bill is that said sale and purchase be declared illegal, fraudulent and void; that the order of said Board of Supervisors, authorizing the Auditor of Sacramento county to draw warrants, be also declared null and void; that said twenty-six warrants be declared null and void, and that the said Rhodes be required to deliver them up to be cancelled; or, that he be decreed to pay plaintiff their value, \$26,000; and that the defendant, Maddux, be directed to cancel and erase from his official books the registry of said warrants, and he and his successors in office forever enjoined and restrained from paying the same, or any portion thereof.

The first question to be considered is, whether the Board of Supervisors exceeded its authority in making the contract of purchase.

The 5th Section of the 11th Article of the Constitution declares that, "The Legislature shall have power to provide for the election of a Board of Supervisors in each county, and these Supervisors shall jointly and individually perform such duties as may be prescribed by law." In pursuance of this provision, the Legislature has provided for the election of a Board of Supervisors in the several counties of the State, and conferred upon them the following powers, among others, viz: "To lay out, contract, and manage public roads, turpikes, ferries and bridges within the county, in all cases where the law does not prohibit such jurisdiction, and to make such orders as may be necessary and requisite to carry its control and management into effect. (4th subdivision, sec. 9, Acts, '55, p. 53.)

"To lease or to purchase any real or personal property necessary for the use of the county: *provided*, no purchase of real property shall be made, unless the value of the same be previously estimated by three disinterested persons, to be appointed by the County Judge." (Sub. 9, sec. 9.)

"It shall have and exercise in its county all jurisdiction and powers other than criminal, conferred by any law on the Court of Sessions, or heretofore exercised by said Court under any statute, or by any statute provided to be exercised by said Court, when the same does not conflict with the provisions of this Act. (Sec. 25, p. 56.)

"And to do and perform all such acts and things as may be strictly necessary to the full discharge of the powers and jurisdiction conferred on the Board."

If the Board of Supervisors possesses the power to make the contract, it was derived from the foregoing provisions of the statute. It is created by statute, derives all of its powers from, and cannot go beyond its provisions. This proposition is admitted by defendants' counsel, and hence it is not necessary to cite authorities in its support.

We are then brought to a consideration of the statute, and the powers and jurisdiction it confers. What is meant by the power to "lay out, control, and manage public roads, turnpikes, &c.?" If the power to "lay out" includes the power to purchase, as is contended by defendants' counsel, then, unless the transaction is tainted with fraud, it is beyond the power of this court to disturb it, however unwise or injudicious it may have been. For it is a universal principle that, where

power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter ; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only question that can arise between an individual's claiming a right under the acts done, and the public, or any person denying its validity, are power in the officer, and fraud in the party." (Arredondo case, 6th Peters R. 129, and the authorities there cited.) In this case, fraud either in the Board, or the defendant Rhodes, has not been seriously urged ; hence the question is one of " power " alone in the Supervisors.

The words " to lay out " in their ordinary acceptation, mean, to purpose, to intend, to take measures, &c. As a delegation of power to the Board of Supervisors, they were used in the same sense in which they were employed in the act respecting " roads and highways." The 9th section of that act declares that " The Board of Supervisors of each county, on presentation of a petition praying for a County Road, to be *laid out* within the county, or praying for a cart road to be *laid out* from the dwelling or plantation of any person to any public road, or from one public road to another, and *designating* the points therein, shall cause notice to be given to the parties owning the land over which said road is to be located ; and if objections by one or more of the owners shall be made, the Board of Supervisors shall consider and determine the same at the next regular meeting, and if they shall be of the opinion that such road is necessary, they shall appoint two persons as viewers, to view out and locate said road, and upon the return of the certificate of the viewers, shall declare the same to be a public highway.

They are found only in the act confining the powers and jurisdiction of the Board, and in the section I have just quoted. If their meaning is doubtful, and interpretation necessary, we must first resort to the Act and endeavor to ascertain from that what was intended, before looking elsewhere. The first section of the Act (concerning roads and highways,) makes all roads public highways which have been, or may hereafter be, declared such by the Board of Supervisors. Section 2 makes it the duty of the Board to divide the county into suitable road

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districts, and to appoint an overseer for each. The overseers are required to keep the roads within their districts clear of all obstructions and in good repair, causing banks to be graded, bridges and causeways to be constructed, and kept in repair and replaced when destroyed. (Sec. 5.) They may use such gravel and dirt as may be absolutely necessary in improving the roads in the district, and the Board of Supervisors shall allow the owners thereof such damages as will be just. (Sec. 5.) The Board has power to levy a tax of four dollars on each able bodied male inhabitant within the county, between the ages of twenty-one and fifty years, and also a property tax of five cents on each one hundred dollars worth of property for road purposes, (Sec. 6;) the four dollar tax to be collected and applied by the road overseers in their districts, and the tax of five cents to be collected by the Sheriff and paid into the County Treasury for road purposes. (Sec. 7.) The overseers may make private contracts for the improvement of their roads at a cost not exceeding fifty dollars, and over that sum by advertising for bids, and pay the same out of the funds in their hands (Sec. 8,) reporting to the Board quarterly the amount of funds collected and paid out, and how applied. (Sec. 10.) Fines may be collected from delinquents, and are required to be paid into the County Treasury, for the use of the road district in which they were collected.

From these several sections it will be discovered that when a road has been used by the public it is converted into a public highway by a declaration to that effect by the Board of Supervisors. That if a new road is desired, the power of the Board is brought into action by the presentation of a petition asking that one be "laid out," designating therein its termini and general direction. If the Board deem the road necessary, persons are appointed to "view out and locate it," and upon the return of their certificate it is declared a public highway. The damages resulting to the owners over whose lands the road may be located, are to be assessed by the Board after the petition is presented, upon public notice, at a regular term, and before the road is declared a public highway.

Now, I think it manifest that the words "to lay out" and "to view out and locate," as used in the act, mean one and the same thing. The road is "laid out" and "viewed out and located." Or, in other words, its direction, its width and its termini are fixed and described

by those appointed for that purpose, and as thus fixed and described to be a public highway.

It is true, the Board can do something more than fix the extent, direction and boundaries of the road, and declare it a public highway. It may assess damages to the land-holders along its route, but this power extends no further than to condemn the land to public use, and assess to the owner such damages as he may sustain by reason thereof; and in the exercise of this power the Board discharged the functions merely of jurors in other States under the writ of *ad quod damnum*. After its verdict is made, or the amount of damages fixed, it exercises the further power of ordering these damages to be paid, but the payment is made out of the road instead of the general fund, as I shall hereafter show, and the power to do so is derived not from the expression "to lay out," but from other portions of the statute.

After the road is laid out, then it becomes the duty of the overseers of the districts through which it passes, to cause it to be put in such a condition as to be traveled; by causing the banks to be graded, bridges and causeways to be constructed, &c., &c.; and the expense or cost of doing so is paid out of the funds in their hands, and the five cent. property tax. These two funds were deemed by the Legislature sufficient for road purposes, and were directed to be applied by particular persons and for particular objects. I know no instance until the present where the general funds of the county were attempted to be applied in this way, or to the purchase of a road, and if the power exists, it is strange that the Legislature should not have been more explicit in conferring it; and that they should have provided a special fund for this object, when there was one already at the command of the Board to which it could resort.

The fact, however, that the Board ordered the purchase money to be paid out of the wrong fund, would not of itself invalidate the contract. But when we consider that the general fund cannot be resorted to, and that the special road fund is to be applied to particular objects, and that the purchase of a road is not of the number, it seems to assist us in ascertaining the intention of the Legislature and the power of the Board.

Again, as an illustration, of what was intended by the power to "lay out" a road, the Act of 1850 (now repealed) authorized the Court of

Sessions to "lay out" cart roads for the accommodation of private individuals, from residences or plantations, to any public road. The same power is vested in the Board of Supervisors by the 9th section of the Act of 1855, and the only difference is that the latter is less specific than the former. But in the latter the words "to be laid out," apply equally to private cart roads as to public highways. And although it may be questioned whether the Board could legally exercise the power attempted to be conferred, by laying out a road over the lands of private individuals for private purposes, still, the employment of the terms in the connection in which they appear, equally serve to show the intention of the Legislature. No one will pretend that the Board of Supervisors will appropriate the funds of the county in the purchase of roads for the accommodation of private individuals, in getting from their farms and residences to some public highway. And yet, if the power to "lay out," includes the power to purchase, the delegation of authority is just as broad in the one case as the other. To say that the Legislature, in the one instance, intended to delegate the power to purchase, and in the other, merely to mark out and define the boundaries, distances, &c., is to accuse that body of a most singular and unique mode of getting at the idea intended.

So much for new roads or roads to be "laid out." The defendants' counsel contend that where a road is already established and put in proper condition for the accommodation of the traveling public, and the right of way secured, the Board of Supervisors may purchase it, if they deem it necessary for the use of the county. This power they derive from the words to "lay out," which we have already examined. The only mention made in the statute of words to this description, is to be found in the first section of the Act of 1855, which declares that all roads shall be considered public highways which have been used and declared to be such by the Board of Supervisors.

Now, if the power to "lay out" does not include the power to purchase, as we think we have shown, it cannot be conferred by the necessities of public convenience, or the right to declare the road a public highway, that has already been used as such.

But the Board may "lease or purchase any real or personal property, necessary for the use of the county," and here it is contended the power rests, if it is not to be found in the other provisions of the

statute. It must be borne in mind that the Board of Supervisors is the mere agent of the county, with limited power and jurisdiction, and that it can exercise no greater authority than has been delegated, and such as may be "absolutely necessary" to carry into effect the delegated powers.

They are authorised, and it is made their duty, to erect court houses, jails and other public buildings, and to furnish the same in a suitable manner. In the discharge of this duty, if it were inconvenient for the time being, to erect and furnish these buildings, they might be leased, including the furniture (personal property) necessary for the use of the county. If they desire to erect such buildings, the power to do so *necessarily* includes the power to purchase lots on which to build, (real estate,) and the materials for the structure, and furniture for its use ; and this, I apprehend, was what was meant by the power to lease and purchase real or personal property.

We have seen that if the Board has the power to make purchases of this description, a right acquired under it cannot be disturbed except for fraud in the Board, or the party claiming such right. The power once granted, the county would be completely at the mercy of the Board's discretion. The word "necessary" could not control, for "the degree of the necessity cannot be a test of the right, but of expediency only," (4th Wheaton, 432 ; 2d Story on the Constitution, 143.) If the Legislature did not intend to limit the Boards, in leasing and purchasing the *kind* of property to which I have referred, then they are unlimited and uncontrolled, except by their own discretion. The counties which they represent are completely within their power and under their control. They may incur debts to an unlimited amount, (at least if the counsel for the defendants be correct upon another point argued in this case,) and tax the people without stint or measure. Should they, in their discretion, become satisfied that the Sacramento Valley Railroad, or the Steam Navigation Company's property, was "necessary for the use of the county," they could make the purchase, and the county and its citizens would be powerless. If (as has been remarked by the plaintiff's counsel) such a power exists, it is time it was understood, for I doubt whether the citizens of Sacramento county are willing that it should abide therein, however prudent and discreet the Board may be.

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But admit that in this respect I am indiscreet, and that the Board does, as an abstract proposition, possess the power to purchase roads and other property for the use of the county ; still there is another objection to this contract, which is, in my mind an insuperable one.

It will be recollected that this road was owned by a joint stock corporation, and that the property in it was represented by twelve hundred shares of capital stock. The Board of Supervisors purchased nine hundred of these shares, and if the contract was valid, thereby became a stockholder in the company, entitled to all of the privileges, and incurring all the liabilities of stockholders. Because the stock passes into the hands of the county, the company was not thereby dissolved or disincorporated.

Let us see what some of the liabilities of a company of this description are, or rather its stockholders, and what they may do.

They may elect a President, Secretary, Treasurer, and a Board of Trustees.

The company may sue, and be sued ; purchase, hold, sell, and convey real and personal property for the use of the corporation ; appoint officers and agents to manage its affairs, and pay them such salaries as the stockholders may agree upon ; pass by-laws, not inconsistent with the laws of the State, for the management of the property of the company ; and borrow money after twenty-five per cent. of its capital stock has been paid in, and mortgage or hypothecate its stock to secure its payment.

It is liable to be sued for damages for the conduct of its employees and agents, and each stockholder is individually responsible for his portion of the debts of the company.

Now if this purchase be a valid one, the county owns property over which neither she nor the present Board of Supervisors have any control ; for it will be recollected that the members of the old Board are directors, and managing the stock on behalf of the county, and that the present Board has nothing to do with it.

But it seems to me that a mere statement of this proposition, and a glance at the consequences resulting from such a power, are sufficient to show that it does not exist.

For these and many others reasons that might be given, I am of the opinion that the contract for the purchase of this stock is illegal, without

authority of law, and void. And this renders it necessary for me to decide another question in the case as to the legality of this contract—based upon estimates of the liabilities of the county at the time it was made. I have found the facts so that it may be raised in the Supreme Court, if the case goes there, and the parties desire it, though I shall not discuss it.

The only remaining proposition to be determined is the propriety, under the views I have taken of the contract, of granting the relief sought by the bill, or rather the power to do so.

It was once much doubted whether a court of equity could interfere to compel an instrument, void upon its face, to be delivered up and cancelled. But whatever may have been the doubts or difficulties formally entertained upon this subject, they seem, by the more modern decisions, to be fairly put at rest; and the jurisdiction is now maintained in the fullest. (Story's Eq., § 700.) This latter doctrine is maintained, however, upon the ground that, if the instrument be negotiable, it may be used for a fraudulent or impure purpose, to the injury of the third parties: or if a deed purporting to convey lands or other inheritances, that it may operate as a cloud upon the title. That if it be an instrument of a different character, it may be applied to improper purposes, or used in after time to promote vexatious litigation, *when the proper evidence* to repeal the claim may have been lost or destroyed, &c. But this "whole doctrine is referable to the general jurisdiction which courts of equity exercise in favor of a party *quia timet*." And, "where the illegality of the agreement, deed or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity, to direct it to be cancelled or delivered up, would not seem to apply; for, in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defense; nor can it in any just cause be said that such a paper can throw a cloud over his right or title, or diminish its security, nor is it capable of being used as a means of vexatious litigation or serious injury. And, accordingly, it is now fully established that, in such cases, courts of equity will not interpose their authority to order a cancellation or delivery up of such instrument." (Story's Eq., § 700 and 701.)

In such a case, it will be regarded as "an important paper, which

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cannot avail its possessor." (6th Peters, 97.) I have examined the most of the decisions cited by plaintiff's counsel upon this point, and the doctrines held by them do not materially differ from the rule above laid down, which I think the correct one.

Testing this case, then, by this rule, ought the relief which plaintiff seeks to be granted? I think not. If I am correct in my legal conclusions as to the contract, it is an utter nullity, void upon its face, and impotent to bind the county. The evidence of its existence is a matter of record, spread upon the minutes of the Board of Supervisors of Sacramento county, and is not subject to be lost or destroyed. The warrants issued in payment of the stock "distinctly specify the liability for which they were drawn, and when it accrues," and they carry upon their face the evidence of their own invalidity, and the supposed liability for which they are issued. No one can take them as an innocent holder or purchaser, and thereby protect himself, for no one can take them without notice. Neither Rhodes nor his assignee, whoever he may be, acquired any rights under them; and if the Treasurer pays them, he does it voluntarily, at his own risk, and with full notice of the consequences. This suit was brought, not for the protection of the Treasurer, but of the county. It has all the protection it requires without resort to a court of chancery. It has failed to make such a case as will warrant the interference of the Court, and the bill must be dismissed at the complainant's cost.

IN RE HOLT.

Fourth Judicial District Court, April, 1857.

ESCAPE FROM SHERIFF—INSANITY.

If a Sheriff unlawfully take a prisoner out of his County, every continuous act of the Sheriff thereafter in the premises is unlawful.

In the absence of evidence of a lawful removal of a prisoner from the proper County, the Court will infer that the removal was unlawful.

The County Judge of a County adjoining the one in which a felony has been committed, has no right to examine into the insanity of a prisoner.

Whatever order a County Judge of an adjoining County makes in the matter of the insanity of a prisoner of another County, is void.

In Re Holt.

A Sheriff who holds a prisoner under a commitment must detain him until he is lawfully discharged.

Wade and Tingley, for the motion.

H. H. Byrne, District Attorney, opposing.

This was a motion to discharge J. W. Holt on habeas corpus from the custody of John M. Barron, who held him by virtue of a warrant from Klamath county, which was properly certified by a Justice of the Peace of San Francisco county.

On the hearing, it appeared that Holt had been Sheriff of Klamath county, and while such Sheriff, Barron, a constable, gave Holt in March, 1857, the commitment of one Donelly, charged with murder. That Holt took Donelly into custody, and then departed from the county and had not since returned. It also appeared that there was no proper jail in Klamath county; that Holt took Donelly to Trinity county, and was seen going towards the jail in that county with Donelly; that the County Judge of Trinity county had certified Donelly as insane, and directed him to be conveyed to the Asylum at Stockton; that Holt had brought Donelly as far down as Sacramento, and then Holt came to San Francisco, since which time Donelly has not been seen. Barron came in search of Holt and Donelly, and finding Holt in San Francisco, arrested him.

HAGER, J.—It appears by the testimony that a person named Donelly was charged with the crime of murder in Klamath county. That he was brought before a Justice of the Peace, and, after a hearing, a warrant of commitment was issued by the magistrate, on which he was taken, and with the commitment delivered to the petitioner, Holt, the Sheriff of the county of Klamath. That he took him to the adjoining county of Trinity, and while there the County Judge of Trinity made an order directing Holt, the Sheriff of Klamath, to take him to the Lunatic Asylum at Stockton. That Holt proceeded with Donelly as far as Sacramento, and there voluntarily suffered him to go at large, since which time he has not been heard of. It appears that the jail of Klamath county is at Crescent City, which town, by a law said to be passed by the present Legislature, is within the territory of

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the county of Del Norte, a new county created out of a portion of the county of Klamath. There being no jail in the present county of Klamath, and no evidence that the authorities of that county made any order for the confinement of prisoners in the jail of any contiguous county, it is a matter of uncertainty where Donelly should have been put for security. But as it appears that the passage of the law creating Del Norte was unknown in the county of Klamath at the time of the commitment by the Justice, the presumption is, that it was the duty of the Sheriff to take the prisoner to the Crescent City jail. But I regard this as immaterial, and will consider the case as if the Sheriff had performed his duty in taking Donelly to Trinity county. If that were the proper place for his confinement, the Sheriff of Klamath should have delivered him over to the Sheriff of Trinity, and the latter should have kept him in confinement until he was discharged according to law. He would then have remained in Trinity county jail as a prisoner of the county of Klamath to await the action of the Courts or Grand Jury of that county, and not of the county of Trinity. The Sheriff of Trinity would be the custodian or jailer of the prisoner for the time being, and responsible for his safe-keeping, and he would have had no authority to remove him from the jail except to obey a writ of habeas corpus—the proper order of the Courts of Klamath, and some few exceptional cases mentioned in the Act relating to Sheriffs, which have no application here. It does not appear by the evidence that Holt delivered the prisoner over to the Sheriff of Trinity, or that he was in custody in the jail of that county. By the order of the County Judge, it appears an application was made to him for the purpose of having Donelly adjudged to be a lunatic, under the 14th section of the Act to establish an Asylum for the Insane, which was done accordingly. By the order of the County Judge, which has been produced here, it appears he was aware of the fact that Donelly had been committed for the crime of murder, and held to answer for the charge in the tribunals of Klamath county. The Act to regulate proceedings in criminal cases, (Compiled Laws, page 42, sections 583, 584, etc.,) points out the mode of trial and proceeding in case of a person accused of crime and alleged to be insane, and section 15 of the same law, under which the County Judge made his order, authorizes the Courts of this State to commit to the Asylum any person who may be

In Re Holt.

charged with an offense punishable by imprisonment or death, who shall be found to be insane. The Courts of Klamath, then, were the proper tribunals to try the question of insanity in this case, and the County Judge of Trinity had no jurisdiction in the matter, and his order therefore was void and afforded to Holt no excuse for disobeying the warrant of commitment which he held at the time. The commitment was regular and valid, and should have been obeyed the same as if it had been made by a Judge of the Supreme or of a District Court sitting as a committing magistrate, and if the County Judge of Trinity and the Sheriff of Klamath could disregard this commitment, they might have done so had it been made by a Judge of the highest tribunal in the State. If such a precedent should be established, and the action of the County Judge be declared legal, it would afford a new and very summary mode of disposing of criminals and delivering prisoners from jails.

By the commitment the Sheriff was bound to receive the prisoner into his custody, and detain him until he was legally discharged. He had no authority to take him to the county of Trinity, except to place him in confinement there in case the jail of that county was made, by a proper order, the jail of Klamath. If he voluntarily, or without legal authority, took him there for any other purpose, he rendered himself liable for an escape, and this offense was committed in Klamath county as soon as the intention was formed to remove him from that county, as his subsequent acts relate back to that period, and the offense would be triable in Klamath county. From the facts that the petitioner Holt disobeyed this commitment—took his prisoner to the county seat of Trinity, and instead of placing him there in confinement, went before the County Judge of that county, received from him an order, in conflict with the command of his commitment, to convey him to the Lunatic Asylum, and without awaiting the action of the Courts of Klamath, of which only he was an officer, voluntarily obeying the order of the County Judge of a county in which he was not an officer, and proceeding with his prisoner as far as Sacramento, suffering him there to go at large, and giving his consent to his making a visit to San Francisco alone, are very suspicious and unexplained circumstances, which present a strong *prima facie* case against Holt. He may have acted in good faith; he may have supposed he was obey-

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ing valid and legal orders when he removed Donelly from Klamath and Trinity, but whilst I have no disposition to pre-judge his case in this preliminary investigation, I am unwilling to reconcile his conduct with innocence. I must, therefore, after having heard the testimony and proofs, under sections 16 and 22 of the Act concerning the writ of *habeas corpus*, (Compiled Laws, p. 167,) award a warrant to re-commit him to custody, and that he be taken before the nearest or most accessible magistrate of the county of Klamath.

BRANNAN vs. MESICK.

Sixth Judicial District Court, April, 1857.

CONSTRUCTION OF WRITTEN INSTRUMENTS—ACKNOWLEDGMENTS.

In the construction of deeds and other instruments the cardinal rule is to arrive at the true intent and meaning of the parties, and to give effect to that intention if it can be done without violating any rule of law.

In certifying an acknowledgment or proof of a deed it is not necessary that an officer should use the express words of the statute. A substantial compliance with the form there given will be sufficient.

Courts feel no inclination to disturb the land titles of the country by undergoing a severity of criticism on the language of a certificate of the proof or acknowledgment of deeds. The omission of the word "uses" in the expression of the term "purposes and uses" is not a fatal defect. The meanings are synonymous.

Constructive notice of a record is not abolished by statute in this State.

Unrecorded conveyances are good against subsequent purchasers, when in the latter, mala fides or malice is shown to have existed.

Courts will not suffer a statute made to prevent fraud, to be a protection to fraud.

Action to set aside a deed as fraudulent and as a cloud upon title.

Volney E. Howard, for plaintiff.

Edwards & English, for defendant.

The facts are fully set forth in the opinion.

MUNSON J.—John A. Sutter, Jr., on the 28th day of June, 1850, sold to Samuel Brannan, S. C. Bruce, Julius Wetzlar and James S. Graham, certain property in the city of Sacramento. Subsequently,

the grantees divided the property, and mutual deeds of division were executed. In July, 1855, Sutter, Jr., conveyed the whole of the property to Mesick, and plaintiff institutes this suit to cancel the last deed, as a cloud upon his title.

The first question involved is the construction of the conveyance or instrument in writing made by Sutter, Jr., to Brannan, Bruce and others. It is said that it is void for the want of certainty in the description of the premises intended to be conveyed. In the construction of deeds, as well as other instruments, the cardinal rule is to arrive, if possible, at the true intent and meaning of the parties, and to give effect to that intention, if it can be done without violating any rule of law—and if the instrument bears upon its face evidence that it was written by a person unskilled and unacquainted with legal requirements and technicalities, a much greater latitude is indulged than when it appears to have been drawn by a careful and skillful draftsman. (*Andrews vs. Murphy*, 12 Geo. Rep., p. 431.) Applying this rule to the instrument in question—making one clause or part aid and help to expound another—there is no difficulty in the description of the property. The obvious meaning and intent of Sutter, Jr., was to sell all the lots he owned in the city of Sacramento—all the real estate he owned in the State of California at the time of the execution of the instrument. I would examine the instrument at length, and show that such was the clear intent and meaning of Sutter, Jr., but it is unnecessary, as the Supreme Court, in the case of *Mesick vs. Sunderland*, decided July term, 1856, held the description sufficient. They say: “Taking the deed as a whole, it is apparent that the intention was to convey all the real estate of the grantor in the State of California.”

The evidence adduced at the hearing of this case clearly establishes that such was the real intent of Sutter, Jr. This evidence, perhaps, could not be taken in view by the Court in construing the words of the instrument, but it shows that the intent, as gathered from the language of the instrument itself is sustained, and sustained by the facts as disclosed by the evidence.

The description of the property being sufficient, the next inquiry is, the nature of the instrument; is it a deed in presenti; does it convey an absolute estate in fee simple with a lien or charge attached, or is it

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a conveyance or condition precedent or subsequent, or is it a mere executory agreement for the sale and purchase of lands?

The Supreme Court, in the case of *Mesick vs. Sunderland*, held that it was not a deed in presenti, nor a conveyance in fee with a lien or charge attached. So far, then, I am precluded from examining the instrument, as the decision of the Supreme tribunal is conclusive and binding upon me. They say that it is an executory contract or a conveyance on condition precedent. There is a distinction between a conveyance on condition precedent and a mere executory agreement for the sale and purchase of lands. The former is a conveyance, and on the performance of the condition transfers an estate. It is true the estate does not vest until performance; but when the condition is performed the estate immediately passes and becomes absolute. A condition is a qualification or restriction annexed to a conveyance of lands. Conditions cannot be annexed to estates of inheritance or freehold estates without deed. (Bacon's Abridgment, vol. 2, 283.)

In the case of an executory agreement for the sale and purchase of lands, the title does not vest upon the performance of the covenants, but a deed or conveyance has to be made and executed before the legal estate passes.

If the instrument in question is not a conveyance in fee with a lien or charge attached, then, in my opinion, it must be construed to be a conveyance on condition precedent or subsequent,—the Supreme Court say on condition precedent. I must so regard it: to show that it is not a mere executory agreement, I would call attention to the language used in the latter part of the instrument; it reads: “And the said party of the first part, his heirs, executors, administrators and assigns, doth further covenant to and with the said parties of the second part, their heirs, that in case the said parties of the second part, their heirs and assigns, pay to the said party of the first part, his heirs, executors, administrators or assigns, the just and full sum of \$25,000, on or before the first day of July, 1850; and the further sum of \$25,000 on or before the 29th day of September, 1850; and the further sum of \$75,000 on or before the first day of July, 1851; making, in all, the just and full sum of \$125,000; then, this instrument is to take effect as a full and complete conveyance in fee of all and singular the lands, tenements, hereditaments, appurtenances and

real estate, in the State of California, belonging to, or in which the said party of the first part, his heirs, executors, administrators, &c., is, or are, in any way, entitled or interested."

It will be seen that, upon the payment of the money, the legal estate was to vest immediately in the grantees; no other conveyance was to be executed. Regarding, then, the instrument as a conveyance, on condition precedent, it was entitled to be recorded, provided it was properly acknowledged.

Section 24 of the Act concerning conveyances, passed in 1850 (Compiled Laws, page 517) reads: "Every conveyance, whereby any real estate is conveyed, *or may be affected*, duly acknowledged, &c., shall be recorded in the office of the Recorder of the county in which the real estate is situated." Sec. 25 provides that every such conveyance, acknowledged or recorded, shall impart notice to all persons of the contents thereof. Sec. 36 reads: "The term 'conveyance,' as used in this act, shall be construed to embrace every instrument in writing by which any real estate is created, aliened, mortgaged, or assigned, except wills, leases for a term not exceeding one year, and executory contracts for the sale or purchase of lands," &c. This is an instrument in writing; it does affect real estate; it is not a will—not a lease, and, as I have endeavored to show, not a mere executory agreement for the sale and purchase of lands; it is, consequently, a conveyance within the meaning of the act, and, as I have before stated, was, if duly acknowledged, entitled to be recorded. I am not aware that defendant, Mesick, intends to attack the certificate of acknowledgment attached to the conveyance to Brannan and others. As, however, it is noticed in the brief submitted, I will as briefly as possible, give my views as to the rule which Courts should adopt in the construction of such certificates:

It is not necessary that an officer, in certifying the acknowledgment or proof of a deed, should use the express words of the statute. The Legislature, in the passage of the Act concerning conveyances, did not so intend; for the Act itself says, a substantial compliance with the form there given shall be sufficient; even if the Act itself did not so provide, the Courts would hold such to be the rule. In the case of *Alexander Botts vs. Merry*, 9 Missouri Rep., p. 510, it was held that when the statute requires the officer to certify that the person

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acknowledging the deed was personally known to him, it is sufficient if he certify that he was known to him. The Court in its decision says: It is much to be desired that every officer who takes the acknowledgment of a deed would conform literally to the law, but we know that the convenience of our people requires that the taking of the acknowledgment of deeds should be entrusted to those who are ignorant of the forms of the law—who will take a proper acknowledgment, but blunder in certifying to it.

In the case of *Shaller vs. Branch*, 6 Bin., 438, the Supreme Court of Pennsylvania says: "We have always declared that it was sufficient if the law was substantially complied with, and on any other principle of construction the peace of the country would be seriously affected, as the certificates of acknowledgment of deeds have been generally drawn by persons who were either ignorant of or disregarded the words of the Act of Assembly. In the case of *Nantz vs. Bailey*, 3 Dana Rep., p. 111, the Court says it is not indispensable that the certificate should state the exact process of examination in verbal detail. Such particularity has never been observed or required. In the case of *Livingston vs. Ketelle*, 1 Gillman, 116, the Supreme Court of Illinois says the certificate states that, "the above named mortgagor personally appeared before the justice and that he was personally known to him as the identical person who executed the mortgage." This is equivalent to the statement that the individual was personally known to the justice to be the person whose name was subscribed to the mortgage. The term, "the above named mortgagor," must be understood to mean the real party who was to execute the mortgage.

See also, *Den vs. Geige*, 4 Halsted, p. 225. *Pickett vs. Doe*, 5 S. & M., p. 471. *Thurman vs. Cameron*, 24 Wend., p. 87. *Jackson vs. Gumaer*, 3 Cowan, p. 552.

The summary of all that can be found in the books on this question as stated by the Supreme Court of Missouri is, that a substantial compliance with the law is alone required. When this appears, the Courts feel no inclination to disturb the land titles of the country by indulging a severity of criticism on the language of the certificate of the proof or acknowledgment of deeds. From the condition of many portions of this State, the disadvantages under which they labor in

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regard to legal information and the necessity of entrusting the execution of the laws in many instances to inexperienced hands, an application of these principles of construction to certificates of acknowledgment will not only be found wholesome, but indispensable to the peace and quiet of the country. The certificate attached to the instrument in this case declares that the grantor acknowledged the deed "for the purposes," &c., omitting the word "uses" given by the statutory form; in every other respect the very language of the statute is strictly followed. The purposes of a deed must be synonymous with its uses. The word omitted is not necessary either to the sense or legal effect of the statutory form.

The instrument from Sutter, Jr., to Brannan and others having been properly acknowledged, and being, as I have endeavored to show, a conveyance affecting real estate, was entitled to be recorded. The evidence shows that it was placed on record in the County Recorder's office of this county on the 20th day of July, 1850. Its registry imparted notice to Mesick, and consequently the subsequent conveyance to him by Sutter, Jr., is fraudulent and void as against Brannan and others.—(See sec. 27th, Conveyances.)

But again, concede that the instrument from Sutter, Jr., to Brannan and others did not operate as a conveyance, and was not entitled to be recorded until the estate passed, yet as soon as the money was paid and the performance of the condition acknowledged by Sutter, Jr., the fee vested, the legal estate immediately passed to Brannan and others, and then most certainly it was entitled to be recorded. The evidence shows that the first payment of \$25,000 was paid to Sutter, Jr., at the time the original instrument was recorded and delivered. On the 18th of March, 1851, Sutter, Jr., executes and delivers to Brannan, Bruce, Wetzlar and Graham, two written receipts—the one acknowledging the second payment of \$25,000, and the other the sum of \$75,000, as payment in full of the third and final payment mentioned in the instrument. These two receipts were acknowledged before a Notary Public and recorded on the 19th of March, 1851, in the office of the County Recorder of this county.

The conditions having been performed, or what is a legal equivalent thereto, their performance having been acknowledged, an absolute estate passed to Brannan and others, and therefore was not the

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conveyance from Sutter, Jr., to Brannan and others properly on record after March 19th, 1851; and did not its registry from that date, if not before, impart notice to subsequent purchasers?

I will now proceed to examine the case regarding the instrument from Sutter, Jr., to Brannan and others as an executory contract. Under the statute of 1850, as we have already seen, an executory contract for the sale and purchase of real estate was not entitled to be recorded. The Legislature, in 1855, however, amended the act of 1850, and authorized the record of such agreements. Was it intended by the Legislature that this act should have a retroactive effect and legalize the registry of agreements which had been previously placed on record, and constitute the registry of the same, notice as against purchasers subsequent to the passage of the act? I think such should be the construction of the Court. Remedial statutes should be liberally construed, sometimes restrained, sometimes enlarged, so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy. The Legislature has the constitutional right to give to remedial statutes a retroactive effect, provided they do not impair contracts or destroy vested rights. 1 Kent. Com., p. 502-3.

It has a right to make that a legal record which was not so before, and constitute the same notice to all purchasers subsequent to the passage of the act. *Mercer vs. Watson*, 1 Watts Rep. 330; *Barnet vs. Barnet*, 15 Sergt. & Rawle, p. 72; *Dulany et al. vs. Tilghman*, 16 Gill & Johns, 461; *Smith Com. on Statutory Construction*.

If the record of the instrument was beneficially affected by the Act of April, 1855, then it imparted notice to Mesick, as he purchased subsequent to the passage of the Act; but conceding that it was not the intention of the Legislature to give the Act of April, 1855, a retroactive effect, then the question arises, was Mesick a purchaser in good faith and for a valuable consideration. When he took his deed from Sutter, Jr., did he have actual notice of the instrument executed to Brannan and others, or did he have such notice as put him upon inquiry and rendered his deed fraudulent? Notice may be either actual or constructive. In some of the States it is expressly provided by statute that an unregistered conveyance shall be void as against all except those having actual notice, thus abrogating constructive notice; but there is no such provision in our statute, and, consequently, in this

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State constructive notice is not abolished. Our Registry Act simply protects a purchaser who takes the precaution to search the records, and registers his own conveyance against prior unrecorded conveyances of which he had no notice. 1 Sand. Ch. Rep., p. 425.

To effect, however, a purchaser having a deed duly registered with constructive notice, it should be of such a nature as to show a want of good faith, and justify an inference of actual knowledge or notice. White & Tudor, Equity Cases, Vol. 2, Pt. 1, p. 132-3.

In the authority cited it is said, nothing is better settled in England and this country, than the general doctrine that the purchaser of a legal title will be liable to all equities of which he had actual or constructive notice at the time of the purchase; a person purchasing under such circumstances is a mala fide purchaser, and will not be enabled by getting in the legal estate to defeat such prior equitable interest. In the principal case this was put on the ground that, although the words of the Registry Acts are express, that unregistered conveyances shall be void as against subsequent purchasers, the Legislature could not have intended to sanction such gross wrong and injustice as is implied in accepting a conveyance of an estate with a knowledge that it had previously been sold to another, and for the purpose of depriving him of the benefit of his purchase.

In England this construction of the act is confined to Courts of Equity; but in this country it is well settled both in Courts of Law and Equity, that a conveyance, duly registered, passes no title whatever, when it is taken with a knowledge of a prior unregistered conveyance. Our recording acts only apply in favor of parties who have acted in good faith, and cannot be made the means of fraud or oppression. White & Tudor, Equity Cases, Vol. 2, Pt. 1, p. 130.

Our act concerning conveyances, sec. 26, provides that every conveyance of real estate not duly recorded, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, thus making unregistered conveyances good when mala fides or malice is shown to have existed. But if our statute contained no such qualifying words, the construction would be the same. White & Tudor, Equity Cases, Vol. 2, Pt. 1, p. 130.

Court, says Chancellor Kent, 10 Johns, 451, will not suffer a *statute made to prevent fraud* to be a *protection to fraud*. It may often be a

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question what fact or circumstances will amount to notice sufficient to charge the party, but if the fact of notice be once made out, there is no doubt in the books but that as against such prior deed the subsequent registered conveyance is to be adjudged fraudulent and void. It is not necessary in any case to constitute notice, that it should be in the shape of a distinct and formal communication; it will be implied in all cases where a party is shown to have had such means of informing himself as to justify the conclusion that he has availed himself of them; whatever, therefore, is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, and to enable him to ascertain their nature by inquiry, will operate as notice. *White & Tudor, Equity Cases*, Vol. 2, Pt. 1, p. 116. If a party designedly abstain from making inquiry for the purpose of avoiding knowledge, he will be charged with notice. 1 *Story's Equity Jur.* § 400—note. Having thus examined the law, let us see whether Mesick was a bona fide or fraudulent purchaser. The conveyance or instrument from Sutter, Jr., to Brannan and others, was placed upon record in July, 1850; if it was placed there without authority of law, the registry *itself* imparted no notice, but it is shown by the evidence that Mesick was engaged in the County Recorder's office in this county, from some time in 1853 to 1855, during a portion of which time he acted as Deputy Recorder, and during the whole time he was actively engaged in transcribing from the records; he was an examiner of titles, made out abstracts, &c.—one of which, dated March 20th, 1855, was produced in evidence. In it he mentions the conveyance or instrument from Sutter, Jr., to Brannan and others; he calls it "conditional," and refers to the book and page in and on which it was registered—thus showing that he had seen, read and examined it—it was a true copy of the original. Under these circumstances, can it be said that Mesick purchased without knowledge—that there was not sufficient to put him upon inquiry? Can he be considered as a purchaser in good faith? I am aware that the Supreme Court of Pennsylvania, (one of the Judges dissenting,) in the case of *Kims vs. Swope*, 2 Watts, 72, says that an actual inspection of a defective registry will not amount to actual notice. But in the first place the decision was not applicable to the facts in the case before the Court, and, consequently, it is a mere dictum—and in the

second place it is, in my opinion, unsupported by sound reasoning. A party purchased two tracts of land—one lying in Huntington county, the other in Bedford county—both tracts were conveyed by the same deed; it was recorded, however, only in Huntington county. I find the decision reviewed in White & Tudor's leading cases in Equity. It is there said—"The evidence was not merely sufficient, but legally conclusive, that the record was a true copy of the deed, as to the lands in Huntington county, although *not* as to those in Bedford county; and if it had actually been examined by the purchaser, which *could not be presumed* and *was not proved*, the case would have stood upon the same footing as if he had seen a deed duly executed and proved of the lands in the former county, and containing a recital of a contemporaneous conveyance of those in the latter. Such a recital would not have been *sufficient to induce* and *direct inquiry*, and thus operate as actual notice. And even if the record was to be regarded as a mere unauthenticated copy, still a copy of a deed, purporting to pass the land for which a purchaser is in treaty, found among the papers of a party claiming an interest in other land under the same deed, would seem to make it the duty of the purchaser to pause in completing his purchase, until he had made inquiry of the parties to the instrument. In *Kims vs. Swope*, however, there was nothing to prove that the copy had been seen by the purchaser, except the presumption that a purchaser examines the registry, which, as a presumption of fact, has no weight whatever, and as a presumption of law, is applicable only when the deed is registered in the same county with the land."

Again, section 27 of the Act concerning conveyances, passed in 1850, authorizes the recording of powers of attorney, and section 28 of the same Act forbids the revocation of a power of attorney until the revocation is recorded. The instrument in question contains a power of attorney from Sutter, Jr., to Brannan, Bruce, Wetzlar, and Graham. As such, it was entitled to be recorded. So far, then, it was not a defective registry, but one authorized by law, and having been seen and read by Mesick, did it not impart notice to him of all its contents, and have the same force and effect as if he had seen the original instrument?

If there existed any doubt, however, with regard to Mesick's having

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actual notice of the existence and contents of the instrument to Brannan and others, it is put at rest by the testimony of Col. Sanders. He testifies to conversation between himself and Mesick, in which the conveyance or instrument was discussed. They called it the 2,200 lot deed, and was by them considered insufficient and void for want of certainty in the description of the land intended to be conveyed. Mesick well knew what land Sutter Jr., intended to convey by the instrument, but he thought the description was imperfect and insufficient, and he was willing to take advantage of it, and for this purpose started for Acapulco, where Sutter, Jr., resided, and obtained from him a deed, not only for the property previously sold to Brannan and others, but all other property which he, (Mesick,) from the examination of the records, concluded had been defectively conveyed. According to the testimony of the witness, Mesick started, promising to obtain the deed in favor of Sutter, Jr. However this may be, he took the conveyance to himself.

The evidence shows that the property thus conveyed to Mesick is worth about one million (\$1,000,000) dollars, for which he paid at the time the conveyance was executed, \$500. He has since paid the further sum of \$900. He also executed to Sutter, Jr., a bond in the penal sum of \$25,000, the conditions of which as testified to by the witness are "very singular." The bond was probably given to secure the payment of a certain portion of the proceeds that Mesick might realize from sales. Mesick's object in connecting himself with the Recorder's office was to engage in a gigantic speculation—having devoted from one to two years to an examination of the records, having ascertained each and every flaw and defect, he takes counsel and proceeds to Acapulco to accomplish his ends; although he was well aware that the property that he was thus seeking to obtain had been previously sold and purchased in good faith; that a valuable consideration had been paid for it—that it embraced a large portion of the real estate in this city—that valuable buildings had been erected upon it, and large sums of money expended in improvements. Although he was well aware that it was held by innocent parties, and who, for years, (so far as the Sutter title was concerned,) had been in the undisputed possession of it. Although he well knew that from many he was endeavoring to take their homesteads, acquired, perhaps, after many years of hard toil and

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labor. Although he was well aware that he was seeking to take from his neighbors that which rightfully and justly belonged to them; that he was throwing a cloud upon titles in this city, and thereby impairing and retarding its prosperity and growth; notwithstanding all this, he asks the Court to aid and assist him in carrying out his gross speculation. I should regret to learn that in any civilized country such a fraud could be successfully perpetrated.

I have no desire to speak harshly, but I feel it to be the duty of courts of justice to discountenance and condemn such unscrupulous and heartless speculations; to countenance such barefaced attempts to unsettle long established titles, and by virtue of mere technical defects, deprive hundreds of parties of property which they have bought in good faith and paid full value for, would be productive of incalculable evil. If courts were to encourage speculations of this character, in the language of Lord Redesdale, "I have no doubt but that they would swarm." In this country particularly, where there has been a great incorrectness in transacting business in remote periods, it would be highly dangerous to encourage such claims. It would be mischievous to society—mischievous to the country. In my opinion, an attempt of this description should be watched with every sort of jealousy in all cases, and received with every mark of dislike which can be shown to it.

Chief Justice Wood, of the Supreme Court of Ohio, in speaking of speculations and attempts to unsettle long established titles, says: "Fear is entertained that the feelings of this Court are hostile to the disturbance of titles long enjoyed, and that unwarranted prejudices may defeat a recovery. For once, I must admit that it is always with me a matter of serious regret when I see litigation springing up that is so often attended with such disastrous results to innocent purchasers. It is only in those cases, however, where the spoil is to be divided with some *mousing speculator*, and when from the state of the law the Court may be forced to aid in that result that it feels itself called upon to give judgment in that spirit of disapprobation which tends to discourage a cause that adds nothing to the character of a profession in other respects proverbial for integrity and correct sentiment throughout the civilized world."

A decree must be entered in favor of plaintiff. Counsel will draw one and submit it to the Court.

Carr vs. Vermuele.

CARR vs. VERMUELE.

Third Judicial District Court, March, 1857.

HOMESTEAD—PURCHASE MONEY.

If the mortgagee advances money to the mortgagor for the express purpose of releasing or cancelling a prior mortgage made for the purchase money of the property, this mortgagee becomes subrogated to the equities of the mortgagee whose lien has been extinguished, and this second mortgage is regarded as given for the original purchase money.

Wallace & Rhodes, for plaintiff.

Vorris & Archis, for defendant.

The facts are fully set forth in the opinion.

HESTER, J.—The facts of this case are briefly these: Potter and wife were seized of a lot of ground in the city of San Jose, in trust for one Gordon, who sold the same to Vermuele, the husband of the defendant, and obtained from him a mortgage thereof to secure the payment of the purchase money. Upon failure to pay the purchase money the mortgage was foreclosed and the lot decreed to be sold to pay the lien. Vermuele, by his agent, before the day fixed for the sale, negotiated a loan of money with the complainant to pay said debt and for other purposes, for the whole of which the complainant was to be secured by a mortgage upon said lot, the complainant having been informed of the intended application of said money. On the same day and just before the intended sale by the officer, the money was procured (\$1200) by Vermuele, who applied \$736 of which in discharge of said decree. On the same day, and immediately after the payment of said decree, (being the 1st day of March, 1855,) pursuant to agreement Vermuele made to plaintiff the mortgage on which this suit is brought, his wife, the defendant, residing in this State, but not joining him therein. Afterwards Vermuele died, leaving the defendant, his widow, who defends against the decree for the sale of the mortgaged lot, on the ground that it is her homestead.

The plaintiff claims to have so much of the lot sold as shall be necessary to make the amount of money applied to said Gordon mortgage,

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and interest thereon. The plaintiff presented his claim in due form of law to the Administrator of the estate of Vermuele, obtained an endorsement of its allowance, but which was rejected by the Probate Judge.

1. The plaintiff contended that in equity, as his money was procured from him to discharge the Gordon mortgage, he should be treated as Gordon's assignee, and be substituted to the same rights of Gordon as mortgagee.

There is much plausibility in this position. In 1 Hilliard on Real Estate, p. 144, it is stated : " A Court of equity will keep an incumbrance alive, or consider it extinguished, as will best serve the purposes of justice, and the actual and just intention of the party. It will sometimes hold a charge extinguished where it would subsist at law ; and sometimes preserve it, where at law it would be merged."

In 1 N. H. Rep., 167, Marsh vs. Rice, cited by 1 Hilliard p. 445, approvingly, it is decided that where A mortgaged land to B and C who permitted a sale of it to pay D's debt against A, (to make which an execution had issued,) under an agreement that said mortgage was first to be satisfied, the land was sold to E, who paid the mortgage debt, and the residue of the proceeds he paid to D ; A conveyed all his right to the land to E. Held that the effect of the transaction was to make E the assignee of B and C, and that the land was not liable to D unless he paid the mortgage debt to E. This case is very similar to the one before the Court. E is the purchaser of A, and in the case before the Court, is the mortgagee of Vermuele, and both entitled to the same equities. In the case cited, E purchased and paid the mortgage voluntarily ; in the present case Carr advanced the money to pay the mortgage, with an agreement with Vermuele that he (Carr) was to be the mortgagee. If Carr had purchased the lot from Vermuele the cases would have been similar. The mortgagee sustains the same relation, under the circumstances of this case, as a purchaser, where the application of the money is the same, to wit, the extinguishment of a previous mortgage, the validity of which being unaffected by the homestead. The loaning of the money to pay the mortgage debt, its payment, and the making of the mortgage, are considered as simultaneous acts, and to constitute but one transaction.

Therefore, if Carr's money was applied to the extinguishment of the

mortgage, he should be treated in equity as the assignee of the equitable interest of Gordon, to whose mortgage the homestead did not attach. See, also, 1 Hilliard, p. 106.

2. A fair construction of the Homestead Act prevents, under the circumstances of this case, the right of homestead from attaching.

The second section of that act contains exceptions to the right of homestead :

1st. Mechanic's, laborer's, or vendor's lien.

2d. Where a mortgage or conveyance of land was lawfully obtained, such mortgage or conveyance to be lawful, if made by a married man, must have the joint signatures thereto of the husband and wife, and acknowledged according to law. The exceptions to this qualification of a lawful mortgage are the following :

1st. Where the wife was not a resident of the State at the time of making the deed.

2d. Where the deed was made before the land became the homestead of the debtor.

3d. Where the mortgage was made to secure the payment of the purchase money.

The object of the Legislature in this enactment was evidently to prevent the right of homestead from attaching to property only to the extent of the debtor's interest therein, and was not intended to be auxiliary to any species of swindling. At the time and before the payment of the money, when the officer was about selling the property to pay Gordon's decree, Vermuele had the right to obtain from Gordon an extension of time as to the payment of the decree, or make a new mortgage for the same debt, without the homestead right attaching ; all this upon the ground that the lot was not paid for, and being to secure the purchase money under said third section. And if he could make such an arrangement with Gordon, he could with the plaintiff, without being effected with the homestead right. Either acts upon the consideration money, the signature of the wife of a mortgagee to secure which is not necessary. This view of the statute gives the husband power over the consideration money, of which the statute never intended to deprive him, and prevents a chicanery to which failing debtors frequently resort. The facts of this case place Carr within the third exception, the mortgage being to secure the purchase money.

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It is, therefore, the opinion of the court that the plaintiff is entitled to a decree for the sale of so much of the mortgaged premises as shall be necessary to pay said money applied as aforesaid to said Gordon decree and interest thereon.

HASSINGER vs. McCUTCHEON.

Third Judicial District Court, March, 1857.

SHERIFF SALE.

A sale void as to third parties may be valid between the contracting parties.

A Deputy Sheriff cannot be a purchaser at a Sheriff's sale, *i. e.*, his principal; even though he be a judgment creditor or the assignee of a judgment creditor.

Action in trespass.

Redman & Younger, for plaintiff.

Vorris & Archer, for defendant.

HESTER, J.—This is an action of trespass, brought for the taking of cattle and horses. The defendant pleaded the general issue; and also that the property was taken by McCutcheon, as Sheriff, and sold to Bodley at the Sheriff's sale, in virtue of which, Bodley alleges he holds the property.

The cause was tried before a jury. The facts proved, upon which the court instructed the jury, are briefly these: That on the 20th day of July, 1854, one Addis sold the property in controversy for a valuable consideration to the plaintiff; that the same was then running at large on the ranch of Addis, who drove them into a corral there situated, and delivered them to the plaintiff, who received them and turned them out of the corral, and placed them under the care of the same vaquero who had previously taken care of them for Addis. The property continued running at large on said rancho, and the adjoining rancho, until the execution was levied, which was on the 6th day of March, 1855, by said McCutcheon, who, in virtue of which, as Sheriff, afterwards sold the property to said Bodley, who was then the deputy of the said Sheriff; that said execution issued upon a judgment against

Cole vs. Pearce.

said Addis, rendered in the year 1852; that said Bodley on the 5th of March, 1855, purchased said judgment and caused the execution to issue for his benefit; that the judgment was for eighty odd dollars; and that the property sold at the Sheriff's sale for the same amount and costs, being much below its real value.

The court instructed the jury in addition to other instructions:

1st. That although the sale, if any was made, by Addis to the plaintiff, might be said as to creditors it was valid between the parties thereto.

2d. That if Bodley was a creditor of Addis at the time he sold to the plaintiff—if he made such sale—and if such sale was made to hinder, delay, or defraud Bodley of his debt, it was void as to his debt; but if the Sheriff sold the property by an execution for Bodley's benefit, and he became the purchaser, being at the same time the deputy of said Sheriff, such sale is void, the title thereby not divested, but still continuing in the plaintiff.—Practice Act, section 223.

Judgment for plaintiff was rendered.

COLE vs. PEARCE.

Third Judicial District Court, March, 1857.

HOMESTEAD.

There must be overt acts of dedication to family use to constitute a right of homestead in property.

A mortgage lien acquired on property before such overt acts of dedication will survive a subsequent right of homestead.

W. T. Wallace, for plaintiff.

Vorris & Archer, for defendant.

This is a suit to foreclose a mortgage made by Pearce—his wife residing with him in this county, but not joining him therein. The complainant alleged that she is a subsequent incumbrancer, and made her a party to the suit. The defendant's answer consists of a general denial and a claim of homestead to the premises.

Merced Mining Co. vs. Fremont.

The facts in reference to the homestead are briefly these: The mortgage was made on the 15th day of August, 1855. Pearce owned the land and resided within a mile of it, but not on it. He commenced building a dwelling house upon it in July, 1855, and completed it in September thereafter. He moved into a part of the house sometime between the 16th and 20th of August, 1855, and has continued to reside there with his wife and children.

HESTER, J.—Upon these facts, and on the authority of *Reynolds vs. Pixley*, April term, 1856, I hold that no dedication was made of the property to the use of a homestead prior to the date of the mortgage, and that as the property was not then impressed with the attribute of homestead, the mortgage was valid and the complainant entitled to a decree.

MERCED MINING COMPANY vs. FREMONT.

Thirteenth Judicial District Court, March, 1857.

INJUNCTION.

An order of injunction granted at chambers without notice to the adverse party may be superseded, *vacated or modified*, by the judge who made the order, without first giving notice to the other party.

This was a suit in the nature of a bill *quia timet*.

S. W. Inge and Cook & Fenner, for plaintiff.

R. A. Lockwood, H. G. Worthington & R. H. Daly, for defendant.

This suit was brought to restrain the defendant from occupying and working certain gold mines in Bear Valley, Mariposa county. The plaintiffs claim to own the mines in question, and deny the validity of the Fremont patent which embraces them. An injunction was issued without notice, and an appeal taken to the Supreme Court—subsequently an undertaking was approved in the sum of ten thousand dollars—upon the filing of which, the injunction was suspended or superseded during the pendency of the appeal.

The injunction contained a clause to the effect that defendants

Merced Mining Co. *vs.* Fremont.

should not "occupy, or hinder, or molest the plaintiff in his occupancy of the said mines. By authority of this clause in the injunction order, the plaintiffs attempted to take possession, which was resisted by defendants. Defendants also resumed their work after the superseas had been filed; whereupon, the plaintiffs applied for an attachment against them for contempt. The order was refused and an application made to the Supreme Court for a writ of mandamus, which was granted upon the grounds that "an appeal bond" did not operate as a supersedeas to an injunction. The attachment then went out, and the defendant, E. S. Beard, was brought up and examined.

BURKE, J.—The defendant, E. S. Beard, has been brought before me charged with being in contempt for violating the order of injunction heretofore issued in this cause.

The injunction order was issued on an *ex parte* showing, at the city of Sacramento. Application was then made by the defendants to have the injunction "vacated or modified." This motion was made at San Francisco, without notice to the plaintiff; and it appearing that an appeal had been taken from the order granting the injunction, and that an undertaking in the sum of ten thousand dollars, with good and sufficient sureties, had been filed, in addition to the three hundred dollar undertaking in the appeal; and it appearing further that the interests of the defendants might suffer great detriment before they could obtain such relief as they might be entitled to in any other way, I authorized the defendants to regard the injunction as superseded until the matter was determined by the Supreme Court.

I regard the ten thousand dollar undertaking as ample indemnity to the plaintiff for all damages which may accrue to him in consequence of the modification of the injunction pending the appeal.

The main question is, can a judge modify or vacate an order of injunction made out of court on an *ex parte* motion without first causing notice to be given to the adverse party?

Section 334 of our Practice Act settles the question as to all other orders, but it is denied that that section applies to injunction orders. The provision in the New York Code, section 324, is the same as section 334 of ours. It was held in New York, up to 1848, that the provision did not apply to injunctions, but since that time it has been held to apply to injunctions the same as to other orders. Voorhies'

Houston vs. Marsh.

New York Code, p. 572, *Bruce vs. Delaware and Hudson Canal Company*, 8 How. Pr., R. 440.

Unless the defendant disobeyed the order of injunction before the filing of the supersedeas bond, he has committed no contempt.—The proof shows that they quit work on the day the injunction was served, as soon as the “steam went down,” and did nothing more except to “clean up the mill,” until the supersedeas was filed.

Although enjoined from *working* the mines, pending the suit, yet, being in quiet possession of them, they had a right to defend the possession against the unlawful entry of plaintiff or any body else. And their having done so is no contempt. The words in the injunction forbidding the defendants to “occupy” the premises, can only be construed to mean that they shall not occupy for the purpose of working them. To place any other construction upon those words makes them worse than nugatory.

There would be no use for actions of ejectment, of trial by jury, and of writs of restitution, if one man, by simply procuring a writ of injunction upon an *ex parte* showing, can oust another from his possession and enter upon it himself. If it were so, Limantour might enjoin and oust the people of San Francisco, and take possession of the city; and Fremont might enjoin the settlers on his “claim” from “occupying” the same; and the mere fiat of a judge would cause an immediate hegira of the whole population.

The defendant is discharged.

HOUSTON vs. MARSH.

Sixth Judicial District Court, April, 1857.

CHANGE OF VENUE.

The court will change the place of trial in a transitory action, and remove it to the county where the principal transactions occurred. *Goodrich vs. Vanderbilt*, 7 How P. R., 467—sustained.

_____, for plaintiff.

_____, for defendant.

Houston vs. Marsh.

Motion to change the venue to Nevada county.

MUNSON, J.—It appearing from the affidavits that the defendant, at the time of making the contract sued on, was one of the Supervisors of Nevada county, and, as such, employed plaintiff to do certain work upon the Court House and jail of that county. After the work was completed defendant presented his account to the Board of Supervisors for allowance, but it was rejected for the reason that defendant had not been authorized to contract with plaintiff; plaintiff then sued the county of Nevada, but was defeated because he could not show that defendant was authorized by the county to make the contract. He now sues defendant individually. Defendant asks for a change of venue on the following grounds:

1st. That the convenience of witnesses and ends of justice will be promoted by it.

2d. That the contract was made by defendant as a public officer, and, under section nineteen of the act regulating proceedings in civil cases, the action is local and must be tried in Nevada county.

Admitting this to be a transitory action, yet it is admitted by both plaintiff and defendant that the contract upon which the action is founded, and all the transactions relating to it, occurred in Nevada county. It is now a well established rule, that the place of trial of a transitory action should be in the county where the principal transactions between the parties occurred, unless the preponderance of witnesses is so great as to warrant the court in retaining the place of trial in another county, or unless it is demanded by some other good cause satisfactorily shown to exist. *Goodrich vs. Vanderbilt*, 7 How P. R., p. 467. Applying this rule to this case, the court is compelled to sustain this motion, for the preponderance of witnesses is in favor of the defendant; consequently, the convenience of a majority of the witnesses will be consulted by the change, which, with the fact that the cause of action originated in Nevada, and no satisfactory reason against the change having been shown to exist, seems to render the granting of the motion imperative. *Goodrich vs. Vanderbilt*, 7 How P. R., p. 467. The motion is sustained and a change of the place of trial to Nevada county ordered.

STEVENS vs. JANES.

Eleventh Judicial District Court, April, 1857.

EJECTMENT—PRIOR POSSESSION.

Where possession of government lands in good faith is shown, the law presumes it to be by consent of the government and will protect this possessor against those who cannot show title derived from the government contradistinguished from presumption of title growing out of possession.

Where the title in A is merely such a possession, by virtue of the license of the government, A can abandon his title for a consideration verbally and without a deed to B, and B thereby becomes the first possessor under the same license of government and subrogated to all the rights of A as if he had continued possessor without abandoning.

Where plaintiff relies upon possession alone as a title, the defendant may show that the plaintiff has abandoned it.

This case was tried by the court without the intervention of a jury, and the court, substantially finds the following facts:

In June, 1852, Jane Shurr was in possession of a town lot in the city of Placerville, and at that time conveyed the same by quit-claim deed to plaintiff.

Plaintiff recorded his deed and went into possession of the lot. He remained in possession until the fall of 1852, when he sold to Alex. Hunter by verbal contract only and placed him in possession. Hunter placed improvements on the lot worth some \$6,000, which were partially destroyed by fire in 1856. He afterwards conveyed to defendant, Janes, in trust for Wells, Fargo & Co., who repaired the buildings and went into possession.

Plaintiff had notice that Hunter was putting the improvements on the lot, and from the time of his verbal sale to Hunter until Hunter sold to Janes, he never made any demand of the possession or claimed to be the owner, and that during that period Hunter was in possession claiming it as his own, and regularly had it assessed in his name and paid the taxes thereon. Whether plaintiff knew of the repairs made by Wells, Fargo & Co. does not appear. Hunter, by the terms of the verbal sale, was to pay \$600 for said lot, and interest understood

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to be two or three per cent. per month—only \$300 was paid by Hunter, and that was in July, 1853.

Robinson, Beatty, Botts and Sackett, for Plaintiff.

Sanderson & Hewes, for defendant.

HOWELL, J.—The first question that I propose examining in this case is, whether the plaintiff has shown that he ever had any higher or better title than that which is presumed from the possession of public lands, or, to state the question differently, am I to treat the lot in controversy as public land in the possession of a private individual by the permission of the government?

The lot is located in the city of Placerville, in El Dorado county. In *Conger et al vs. Weaver et al*, October term, 1856, it is said that, “every judge is bound to know the history of the country where he presides. This we have held before, and it is also an admitted doctrine of the common law. We must, therefore, know that this State has a large territory; that upon its acquisition by the United States, from the sparseness of its population, but a small comparative proportion of its land had been granted to private individuals; that the great bulk of it was land belonging to the government, and that but little as yet has been acquired by individuals by purchase; that our citizens have gone upon the public lands continuously from a period anterior to the organization of the State government to the present time.”

It is made the duty of courts to go to this extent in their judicial knowledge of the countries in which they preside; then it is a matter of open public notoriety, and a universally admitted fact that the district of country embracing the lot in controversy is public domain, and that the only title of those who have made settlements in this portion of the State, is that which grows out of the occupation of public lands, with the consent or approbation of the government.

Admitting, however, that this is a greater stretch of judicial information than sound reason and the rules of law will permit, the first section of the act for the “protection of settlers,” &c., statutes of '55, p. 54, declares that, “*All lands in this State shall be deemed and regarded as public lands until the legal title is shown to have passed from the government to private parties.*” I am aware that

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certain provisions of this act have recently received a judicial construction at the hands of the Supreme Court, (*Billings vs. Hall*, Jan. T., 1857,) and been pronounced unconstitutional; but this is not one of them, nor do I suppose it to be liable to such an objection. It merely raises a presumption against a party which he is at liberty to overcome by proof. If he prove that he or his grantors were the first possessors in good faith, it is sufficient to maintain ejectment against a mere intruder, or one who cannot show a better right. Where possession of this character is shown, the law presumes the possessor to be in by consent of the government and will protect him against all others who cannot show *title* derived from the government, as contradistinguished from *presumption* of title growing out of possession.

He is regarded as having a license from the government to occupy its lands, and good faith and sound policy require that he should be protected.

Now, if I am to take judicial notice that this lot at the time of its settlement was a part of the public domain, or if under the above statute I am so to treat it, as no title has been derived from the government, and no grant exhibited, the plaintiff has shown such title only as is presumed from the occupation of public lands. He proved that Jane A. Shurr was in possession in 1852, and that on the 17th of that month she quit-claimed to him and surrendered her possession. He has shown in her a bare possession unaccompanied by claim or color of title, and that she transmitted to him only such title as she possessed. These facts, according to *Conger et al vs. Weaver et al*, are sufficient to show a license from the government to occupy her lands, and that the occupant will not be treated as a trespasser, and for the reasons so well stated in that case, that, "the government has not only looked on quiescently while the appropriations were being made, but has studiously *encouraged* them in some instances and recognized them in all." The right or license is not acquired by any deed or license technically speaking, but merely by entry upon unappropriated public domain, and using or applying it to the private purposes of the occupant. The possession of the party takes the place of his title deeds and is the evidence of his ownership or license.

Now, as these rights are acquired by appropriation and occupation merely, it follows conclusively that they may be lost or surrendered

by ceasing to appropriate and occupy. No one will controvert the proposition that if A, to-day, enters upon a piece of unappropriated public land, and improves it to any extent, he may next year, or at any time he chooses, surrender it back to the government by ceasing to occupy it, with the intention of discontinuing his appropriation or ownership, or, in short, by abandoning it. It then becomes public property again with all the improvements that have been put there, and under this general license from the government any one may again appropriate it with the improvements in the same manner. If these things can be done, and that they can I think no one will doubt, what is to prevent A or any subsequent occupant of the premises from surrendering to B, for a consideration, and that too verbally and without a deed? Why may he not say to B, I will abandon my possession and right of possession if you will pay me for so doing, under such circumstances as to allow you to become the first occupant after I leave? It is true, under such an arrangement, B's title might not date further back than A's surrender to him. The distinction between such a transaction and a technical conveyance, such as is embraced and referred to by our statute of frauds, is this: that in a deed of bargain and sale the deed itself operates as a transfer of the title and of the possession. The grantor in the deed does not *abandon* his title or possession, but continues to assert title up to the moment of the complete execution and delivery of the deed, at which time it passes to the grantee, thereby connecting a new party with it, who traces it back through his deeds to the fountain head. But where there is a mere surrender or abandonment of possession (which is the occupant's deed, or rather substitute for a deed) there is no title transmitted or passed, but one *lost* merely by act of the occupant, and an *original one* gained by the party to whom he surrendered.

Now let us see whether this case comes under the rule I have laid down.

Plaintiff was in possession and made a verbal sale to Hunter for \$600, and delivered him the possession. Hunter afterwards paid \$300 of the purchase money, and then deeded to the defendant Janes as trustee for Wells, Fargo & Co. There was a dispute as to whether the \$300 was paid, and I think it is immaterial so far as this case is concerned whether it was or not. There were no conditions in the

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sale,—nothing from which it could be inferred that Stevens was to retain the title until the money was paid. Had the agreement been reduced to writing in the form of a deed, it would have operated as an unconditional conveyance for \$600, to be paid thereafter by Hunter. The title would have passed whether Hunter had ever paid the money or not, and the most the plaintiff could have done would have been to assert a vendor's lien for the purchase money. I refer to these things not for the purpose of making them the predicate of an argument in support of a parol agreement for the sale of lands, for I am well aware that the Supreme Court has held in *Abell vs. Calderwood*, that such an agreement is void under our statute of frauds; but for the purpose simply of arriving at the intention of the parties, and showing that it was plaintiff's object to surrender his possession to Hunter in consideration of the promise of the latter to pay him \$600. This view of the case is further strengthened by the fact, that from the time he sold to Hunter until the latter sold to Wells, Fargo & Co., he stood by and allowed Hunter to assert his title to the lot—pay taxes on it, have it assessed in his own name, and place improvements on it to the value of \$600 or \$700, without ever claiming it as his own, or pretending to question the validity of the transfer.

Under these circumstances, the plaintiff should be deemed to have surrendered or abandoned his interest in the lot, which was one of possession alone, for the consideration agreed to be paid, and that Hunter became the first possessor thereafter. Under this view of the transaction, it is not obnoxious to the statute of frauds, and does not trench upon the decision of the Supreme Court in *Abell vs. Calderwood*.

But it is said that inasmuch as the deed from Jane A. Shurr to the plaintiff was on record, at the time of defendants' purchase from Hunter, they took with notice of plaintiff's title, and will not be protected. If I am correct in the principles I have enunciated, the error of the argument is in supposing that Hunter was a purchaser in the technical sense of the term, or that plaintiff had any title to be protected at the time of defendant's purchase.

In the Western and Middle States, where the doctrine that prior possession is sufficient to maintain ejectment has pretty generally prevailed, and where the condition of land titles in the early settlement of those States was very similar to what it is here, it has frequently

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been held that if the plaintiff relies upon possession alone, the defendant may show that it has been abandoned. And the same doctrine has been substantially held by the Supreme Court of this State, in *Bequette vs. Caulfield*, 4 Cal. R., 278. In this case it appears that *Caulfield* was in possession of a lot in Sacramento City; *Pearis* commenced an action for forcible entry and detainer against him before a Justice of the Peace. *Caulfield* told him that he wanted to have nothing to do with the lot, and that *Pearis* might take possession. The latter did so, and then sold to *Beirne*, and he gave plaintiff a bond for a deed, and put him in possession. *Caulfield* afterwards got possession, and the plaintiff brought ejectment, and the Court, after stating that prior possession will maintain ejectment, say: "Where a party can show nothing but a prior possession, that reliance may fail if it can be shown that he voluntarily abandoned it, without the purpose of returning."

These views render it unnecessary for me to notice the other questions in the case that have been argued at such great length in the briefs of the attorneys.

For the foregoing reasons my conclusions of law are that plaintiff should take nothing by his suit, and that defendants should have judgment for their costs, and the Clerk will enter judgment accordingly.

THE PEOPLE EX. REL., ATTORNEY GENERAL vs. WRAY.

Third Judicial District Court, April, 1857.

HIGHWAYS.

A direction to open a highway, though given by the Board of Supervisors, deflecting from the established line, could not change the highway.

A highway must be designated in width, and be clearly defined.

Bill to enjoin defendant from obstructing an alleged highway.

McKee, for plaintiff.

McCabe, for defendant.

HESTER, J.—The complaint in this case alleges that the defendant

The People, ex rel., the Attorney General vs. Uray.

obstructed a highway between the bridges of San Leandro and San Lorenzo creeks, and threatens further obstruction of the same, and prays for a perpetual injunction. The defendant denies the material allegations of the complaint.

The evidence establishes that in the year 1856, proceedings were had in due form at a session of the Board of Supervisors for the purpose of establishing a public highway, on a straight line between said bridges; that viewers were appointed who reported favorably; that the Board made an order establishing a highway between said bridges, on a straight line, and made a further order directing it to be opened, not on that line the whole distance, but including a few rods, a part of the distance, west of it; it was accordingly opened and traveled upon; the deflection of the line of the highway was upon the land claimed by defendant: that portion of it on the land of the defendant was obstructed by him, and threats made of further obstruction.

No width was given to the highway by the order establishing it.

Upon these facts the cause was submitted to the Court.

The Court decided that the order establishing the highway was intended to create a public easement. That a direction to open the same, though given by the Board, deflecting from the established line of the highway, could not change it; neither could the supervisor thereof deviate from the established line. (*Whipps vs. the State*, 7 Black., 512.)

The Court also decided that the order establishing the highway was a nullity, as no width was given to it. Such public easements should be clearly defined—a mathematical line was not sufficient. The public and the adjoining land owners are interested in the character and extent of the easement.

The Court dismissed the complaint.

PURSLEY vs. PURSLEY.

Tenth Judicial District Court, May, 1857.

DIVORCE—EXTREME CRUELTY—CONDONATION.

It is *extreme cruelty* for a husband to call his wife a harlot in the presence of others.

Pursley vs. Pursley.

Extreme cruelty is not necessarily assault and battery, but equally applies to defamation of character.

Condoned acts of cruelty may be revived by subsequent bad conduct, even if the latter would not of itself justify a separation.

This was a case in which plaintiff asked for a divorce from defendant, on the alleged ground of extreme cruelty.

Stephen J. Field, for plaintiff.

T. B. Reardon, for defendant.

BARBOUR, J.—The plaintiff, in her bill, relies upon the charge of extreme cruelty, and urges this as a chief cause for divorce. This Court has, heretofore, in several cases, held that a husband calling his wife a harlot in the presence of others, was an act of extreme cruelty, when there was no proof of the charge, and her general character and good conduct did not allow such a presumption. Much I think depends on the intellectual, moral and social condition of the parties. With persons who have received no moral or religious training, who have not kept pace with the present state of civilization, as it exists in our country at this day, and whose passions are uncontrolled, grossly indecent language often passes as mere badinage. But it is said that the “*decencies* of life belong equally to all classes;” this I grant, and in none are they more carefully observed and cultivated than with a large majority of the American people. Yet it is not true that all classes practice the *decencies* of life, for if such were the case there would be fewer applications for divorce. Chancellor Walworth defines *legal cruelty* to consist in that kind of conduct which endangers the life or health of the complainant, and renders cohabitation unsafe. Our old common law authors insisted that there must be personal assault and battery, and even this was permissible provided the stick used was not larger than the thumb or fore-finger. But the present condition of refined society will not admit of this severity of construction. To a lady of delicacy of feeling, purity of thought and refined sensibilities, I can conceive of no greater cruelty than by falsely charging her with prostituting her person. She would readily forgive a blow, when her pride of virtue could never permit her to overlook or forbear the aspersion and defamation of character.

Pursley vs. Pursley.

The counsel for the defendant contends that there has been a condonation on the part of the wife. The offense complained of occurred in the years 1854 and 1855, and the evidence establishes the fact, that since then and up to March of the present year, when they parted, there had been a reconciliation and cohabitation between the parties. In the latter part of 1856 she followed him to San Francisco, where he was engaged in business, and on her return to Marysville she declared that he had treated her better than he had ever done since their marriage. This was the statement of one of her witnesses. But it is said that condoned acts of cruelty may be revived by subsequent bad conduct, and that the pardon of the wife implies a condition that the husband will afterwards treat her with conjugal kindness. This is true even if the subsequent conduct of the husband would not of itself justify a separation; still the after acts to revive the first cause of complaint should be of no trivial or slight consequence, but such as would reasonably justify the apprehension of a renewal of bad treatment.

The immediate cause of separation was the result of a misunderstanding between defendant and Albert about a sum of money which the latter owed him for board; the boy, according to his own testimony, behaved rudely to his step-father, and was wanting in respect and good manners towards an old man, which was calculated to vex and annoy him. Albert, who is eighteen years of age, was permitted to do business on his own account; he occasionally worked for his step-father, who paid him thirty dollars per month wages—there was no legal obligation on the part of defendant to support him, and he had a right to require him to leave his house if his conduct was offensive, or otherwise if he chose.

The only evidence in the case that proves the defendant to have used improper language to his wife, is that of Albert, and his manner of testifying showed that he greatly disliked defendant, and I think was not disposed to do him justice. The separation took place on the 19th of March, and on the 21st plaintiff filed her bill, when she was scarcely prepared to act considerably in taking so important a step; certainly the trifling difficulty of her husband with Albert should not have justified the proceeding—it ought to have been regarded as one of those episodes of family affairs, which should not have permanently disturbed the smooth current of wedded love, and blight forever the gentle influence of domestic happiness.

Cramer vs. Maguire.

Considering all the facts, I am satisfied that the plaintiff is not entitled to the relief demanded. It is therefore ordered that the bill be dismissed, and that the defendant pay the costs of this suit.

CRAMER vs. MAGUIRE.

Fourth Judicial District Court, April, 1857.

JUDGMENT AFTER FIVE YEARS.

Where a judgment has been obtained five years previous, if the plaintiff moves the Court for an execution and makes the necessary affidavit which the defendant denies, the Court will refer the matter to take proof and report upon the same.

Plaintiff obtained judgment against defendant in April, 1852, for \$2,045, and applied for an execution to issue on same. The affidavit on file alleges that the judgment has never been satisfied, but by mistake or otherwise, the same appears by the entry on the record to have been satisfied under an execution issued out of the Justice's Court of the Second Township of this city, in the suit of H. B. Denman against John Cramer, which was issued against Cramer as defendant. That said judgment was levied upon and sold in November, 1854, and the purchaser thereof acknowledged payment of said judgment, though not in form or manner required by law, and the same was marked satisfied upon the record on the 8th June, 1855. It is further alleged that the entry of satisfaction was made by the Clerk, either under the impression the said execution was issued against Silas Cramer, the plaintiff herein, or else under a representation that said John Cramer was the owner of the judgment, which representation, if made, was contrary to the fact and to the record.

The defendant pleads the statute of Limitation, and that the judgment belonged to one John Cramer, and is not the property of plaintiff.

Robert Rankin, for plaintiff.

J. B. Hart, for defendant.

HAGER, J.—By the Practice Act, § 209, a party in whose favor

. Chipman vs. Bowman.

judgment is given may, at any time within five years after the entry thereof, issue a writ of execution for its enforcement, and after the lapse of that time (same Act, §. 214) it can only issue by leave of the Court on motion ; but such leave shall not be given unless it be established, by the oath of the party or other proof, that the judgment or some part thereof remains unsatisfied and due.

In this case the five years having expired, and it being alleged that the judgment is satisfied, which plaintiff denies, an order may be entered referring the matter to James Van Ness, Esq., to take proofs and report the same, with his opinion, whether or not the judgment or any part thereof remains unsatisfied and due, and the amount thereof.

CHIPMAN vs. BOWMAN.

Fourth Judicial District Court, April, 1857.

SUPERIOR COURT—IRREGULAR PROCESS.

Process issued out of the Superior Court of the City of San Francisco, and served upon a defendant residing out of said City, is a nullity for want of jurisdiction.

An appearance by a defendant after judgment, who moves to open the default and be allowed to come in and defend, is not such an appearance as amounts to a bar of this want of jurisdiction.

This was a suit to obtain a decree of this Court, to set aside and declare void a certain judgment for \$5,417, entered by default in the Superior Court, against plaintiff herein, on the 3d of July, 1854, and now held by defendant Bowman. The case was tried without a jury.

W. W. Chipman, for plaintiff.

S. M. Bowman and *G. H. Gray*, for defendant.

The other facts in the case are contained in the opinion :

HAGER, J.—By the pleadings and evidence, the plaintiff was served with a summons and complaint in the county of Alameda, by the Sheriff of that county ; upon failure to answer, judgment by default was entered against him in the Superior Court of this city, from whence the

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process had issued. The question here presented is, whether there was a want of, or merely an irregularity in obtaining, jurisdiction over the person of the defendant, (plaintiff in this action,) in the action of the Superior Court. Under the decisions of the Supreme Court in regard to the jurisdiction of the Superior Court, as in the case of Whitwell vs. Barbier et als., I am compelled to hold that, at the time of the default and judgment, the latter Court had no jurisdiction over the person of the defendant, and that the judgment is a nullity. The Court could not legally send its process in the county of Alameda, and the defendant in the action, if served there, was not bound to obey it. If, however, he had appeared or answered before judgment, without objecting to the jurisdiction of the Court over his person, this might have been equivalent to a voluntary appearance, or a waiver of the objection; but his appearance subsequent to the entry of the judgment, in his efforts to have it opened, and being allowed to make defense, cannot be construed into a waiver of the objection, or as conferring any greater jurisdiction over the person of the defendant at the time of the judgment, than the Court had already acquired by the service and return of its process. Judgment for the plaintiff is ordered.

WOOD vs. HAMBLY.

Fourth Judicial District Court, April, 1857.

CORPORATIONS—INJUNCTION.

Officers of a Corporation having been elected and having entered upon their official duties, must be regarded as officers *de facto*, until ousted in a proceeding to determine their rights *de jure*.

The complaint must be framed with a view of obtaining the exact remedy sought, and the Court will not consider affidavits introduced in an action, which set forth facts in variance with the relief sought in the complaint.

Motion to dissolve an injunction.

Cook & Fenner, for plaintiff.

Wood vs. Hambly.

Hoge & Wilson, and Wm. Duer, for defendant.

HAGER, J.—By the evidence introduced upon the hearing of this motion, it abundantly appears that the defendant Hambly, and his associates, were at the last annual meeting of the Mountain Lake Water Company, elected trustees of that Company, and that defendants Hambly and Sterritt were respectively elected President and Secretary thereof. Whether or not this election was valid, or was legally conducted, cannot be determined in this action. But its having taken place, been declared, and the trustees and officers having been installed into office, and entered upon the performance of their duties, they must be regarded as the *de facto* officers of the corporation, until by a direct proceeding to determine the officers, etc., *de jure*, it shall be held otherwise and they be ousted.

By the injunction in this action the defendants are restrained from doing certain things, which, for all that appears, may be incumbent upon them to do as officers of the corporation. The allegations of the complaint are, and the injunction order was made upon the supposition, that the defendants were not the *de facto* officers of the corporation, but wrongdoers, pretending to act as the officers, in violation of the rights of the stockholders, and in disregard of the authority of the regular officers of the corporation. By the proofs, a contrary state of facts appearing, the injunction was improperly obtained. Many of the affidavits of the plaintiff appear to have been introduced with a view of showing that the defendants have threatened, and are about to act prejudicially to, and in violation of the rights of the stockholders, and for that reason, it is argued, that the injunction should be sustained. A Court of equity may no doubt interpose to protect the rights and interests of stockholders, and will grant its injunction to restrain the officers of a corporation from transcending their powers, or doing any act in violation of the individual rights of its members. But the complaint in this case is not framed with a view of obtaining such relief; it denies the facts of defendants being officers, or of their having any authority to act for the corporation. To obtain relief in this respect, plaintiffs may institute another action against defendants, as officers, and upon a proper showing no doubt an injunction may be obtained. This injunction is dissolved.

Hofley vs. Elder.

HOFLEY vs. ELDER.

Sixth Judicial District Court, May, 1857.

COSTS.—TRAVELING EXPENSES.

The necessary expenses incurred in traveling to and from a place to take a deposition, will be allowed as disbursements.

Disbursements in our practice has a more extensive meaning than under the Common Law system.

Motion to retax a bill of costs.

W. S. Long, for plaintiff.

————— for defendant.

MONSON, J.—The plaintiffs, in accordance with a notice from defendants, went to San Francisco to attend to the taking of the deposition of certain witnesses for defendants. The plaintiffs having obtained a judgment have charged as a disbursement in their bill of costs, the traveling expenses incurred in going to San Francisco to take said depositions. Defendants now move to strike out the charge, contending that it is not taxable. The statute gives to the party prevailing in an action in the District Court his costs and necessary disbursements. Was the money expended by plaintiff in going to San Francisco to attend to the examination of defendants' witnesses a necessary disbursement? I do not see how it can be considered other than as such. The defendants required the plaintiffs to go there. It was necessary that they should attend the examination in order to protect their own interests. The disbursement for traveling expenses was unavoidable. It is not contended that the charge is exorbitant, and inasmuch as plaintiffs have prevailed in the action, the defendants ought to be charged with the same. The word "disbursements" as used in the act regulating proceedings in civil cases, has a more exclusive meaning under the present than under the Common Law system of practice. *Fitch vs. Colvert*, 13 How. Pr. Rep. p. 13.

Motion overruled with costs.

Fogarty vs. Finlay.

FOGARTY vs. FINLAY.

Twelfth Judicial District Court, May, 1857.

ACKNOWLEDGEMENTS.

It seems that a Notary Public is not responsible for a defective acknowledgement where the party or his attorney prepared the acknowledgement and merely directed the Notary to sign it.

A County Recorder is required to see that acknowledgements are properly executed before he puts them on record, and should refuse to receive for record an improper and defective acknowledgement.

A party will not be allowed to recover damages against a Notary Public for an improper or defective acknowledgement, when he has exhibited on his part an ignorance of the requirements of the law, and a want of diligence in being properly informed thereupon.

The plaintiff had a mortgage, dated 12th May, 1854, for \$800, made by one C. A. Dupuy, and acknowledged before defendant Finlay. The mortgage was recorded on the 23d May, 1854.

On the 21st April, 1854, the same property had been mortgaged by Dupuy to Lewis Wolf, for \$1800, which mortgage was recorded on the same day the mortgage was made.

On the 3d November, 1854, a satisfaction of the mortgage to plaintiff, purporting to be executed by him and acknowledged before G. J. Hubert Sanders was placed on record.

On the 7th April, 1855, a satisfaction of the mortgage to Wolf was made and recorded, and a new mortgage to take its place for \$2500, being \$700 in addition to the old mortgage, was made and recorded.

In the spring of 1855, G. J. Hubert Saunders left this city to escape trial for forgery.

In July, 1855, Fogarty commenced a suit for the foreclosure of his mortgage, in the Superior Court. On the trial of that cause, two issues were determined—first that the mortgage to Fogarty was genuine; and second, that the satisfaction filed of that mortgage placed on record was a forgery; foreclosure of the mortgage was consequently ordered.

In October following, Wolf commenced suit in the Twelfth District Court, for foreclosure of his mortgage, making Fogarty a party, and alleging that Fogarty's mortgage was second to his.

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On the trial of this case, Fogarty's mortgage being offered in evidence, as a properly acknowledged and recorded instrument, giving notice of its contents, it was objected to on the ground that the Notarial certificate was defective, it not stating that Dupuy was known or proved to the Notary to be the person who executed the instrument, and consequently was not entitled to be recorded.

The Court sustained the objection, and rejected the mortgage, and Fogarty being unable to prove notice in fact of the existence of his mortgage to Wolf, judgment of foreclosure in Wolf's favor followed. The Supreme Court on appeal sustained the opinion on the question of the insufficiency of the Notarial certificate, and the property was exhausted in satisfying Wolf's mortgage.

Fogarty then brought the suit against Finlay, the Notary who made the defective certificate, and the sureties on his official bond, claiming to receive from them the amount of his mortgage, interest, and costs and counsel fees in the suits in the Superior and Twelfth District Courts before mentioned.

The defendants put in issue the genuineness of the mortgage and release, which were determined by the jury in the same way as in the Superior Court.

Hoge & Wilson, for plaintiff.

Shepard & Woodyard, and *C. V. Grey*, for defendant.

NORTON, J.—The facts in this case being found by the jury, there remains but two questions which have been argued at law upon which I am called to decide. First, whether the plaintiff can recover against the Notary who is defendant; and secondly, what are the proper damages, if he should recover.

On the trial it appeared that the defective certificate of acknowledgement was made on a printed form, accompanying the mortgage, and the filling in of that certificate, even including the words "Notary Public" at the foot, was in the hand-writing of G. J. Hubert Sanders, the certificate being apparently prepared, so that all that the Notary had to do was to sign his name and affix his seal after taking the acknowledgment. It was also in proof that the plaintiff had employed

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Sanders as his attorney and agent in making this loan, and that Sanders had taken Dupuy to Finlay's office, where the acknowledgment was made. It also appeared that the prior mortgage to Wolf had precisely the same defect in the acknowledgment as this of Fogarty's. Under these circumstances I should hesitate somewhat in allowing the plaintiff to recover damages from the Notary for making as it appeared just such an acknowledgment as was prepared and delivered by the plaintiff through his attorney and agent. I also have some doubt whether, under the circumstances of the prior mortgage to Wolf, the plaintiff by his mortgage had anything pledged beyond the equity of redemption; and I hardly think, presuming the plaintiff have any right to such damages as he claimed, whether he would be entitled to anything more than the difference between the value of the property and the amount rendered necessary to satisfy the first mortgage; but inasmuch as the decision will be taken to a higher Court for review, I shall not base my opinion upon this ground alone but will pass to another and more important point.

It has been argued strenuously by the plaintiff that the Notary held himself out as competent, and contracted to give such a certificate as would entitle the instrument to be placed upon record, and that consequently, if he failed he was liable for all loss. I think the liability does not extend so far. Indeed, looking at this case throughout, I think the County Recorder is more directly the cause of the loss of the plaintiff than the Notary. A certificate might be required and be used for other purposes than that of recording; that was only one of the objects of acknowledging deeds. It might be simply to prove a signature when a record of it would not imply any notice or be of any possible avail. The Notary only contracted to give a certificate, not to put it on record. But it is the County Recorder's duty only to place on record such deeds as were properly acknowledged. Had he, when the plaintiff took the deed to him for record, pointed out the defective certificate, the plaintiff's attention would have been directed to it then, supposing him previously to have been ignorant, or not to have noticed the peculiarity of the acknowledgment. The case seemed to him to resemble very much the one which had been cited in the argument, where a Postmaster was sued for loss alleged to have been sustained by delay in the delivery of a letter. The plaintiff in

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that suit, had he known (as he was presumed to know,) the law and his rights, and that he could have fixed the liability of a prior endorser, by sending a special messenger the same day he received the letter, and not waiting until the next day's mail, he would not have sustained any loss. The Postmaster therefore, was held not to be responsible for loss sustained in consequence of the plaintiff not sending notice by special messenger after the departure of the mail, although he had detained the letter to plaintiff giving him notice of nonpayment of the note, so that he could not send notice by mail as the law required. So in this case, had the plaintiff not slept on his rights, or had he been awakened to them by the Recorder, pointing out the defect in the certificate, he could have had the defect supplied or remedied by a new acknowledgment; and it was nearly a year after the making of his mortgage before the one which was foreclosed and took precedence of his was made and recorded. I must therefore hold that plaintiff is not entitled to recover more in any case than the cost of the certificate; and as proof was not made by the plaintiff of the value, and it appeared that no new certificate was made, and the plaintiff did not desire a judgment if that was all he could get, as it would not carry costs, I must give judgment for the defendant.

KELLER vs. KELLER.

Sixth Judicial District Court, May, 1857.

DIVORCE—AMENDMENT.

The Court is only authorized to allow an amendment to a complaint by adding another count "upon affidavit showing good cause therefor." Upon a want of such affidavit the Court will refuse to allow an amendment.

Quere.—Can a party suing for a divorce unite in a complaint, charges of adultery and cruel treatment?

A motion to amend a complaint in divorce by adding a count charging adultery, without filing the necessary affidavit.

Smith & Hardy, for plaintiff.

Defendant not in court.

Allen vs. Howland.

MONSON, J.—This is a suit for divorce. The complaint was filed on the 6th day of September, 1856. The defendant has filed no answer. The case was set for trial during the last term of the court, but continued on application of plaintiff. She now seeks to amend her complaint by adding another count, charging defendant with adultery. The Court is only authorized to allow an amendment to a complaint by adding another count “upon affidavit showing good cause therefor.” This motion is not founded upon affidavit. Plaintiff admits that the alleged act of adultery was committed before the institution of this suit: if she was cognizant of it at the time she filed her complaint, she then had an opportunity to charge defendant with it, and having failed to do so, she ought not to be permitted to amend her complaint now, unless some good excuse is shown for her negligence: if she was not aware of the alleged act of adultery when she instituted this suit, she should so state on an affidavit. Can a party unite in a complaint, charges of adultery and cruel treatment?

Motion denied.

ALLEN vs. HOWLAND.

Sixth Judicial District Court, 1857.

SETT-OFF.

A joint indebtedness cannot be sett-off as a defense to a separate indebtedness, nor a separate debt against a joint one.

Demurrer to an answer pleading a set-off.

McKune, Johnson & Ackeney, for plaintiff.

W. P. George, for defendant.

MONSON, J.—This action is brought to recover the sum of five hundred dollars, alleged to be due from defendant to plaintiff. In his answer defendant denies being indebted, and then sets up as a counter claim two promissory notes, drawn and executed by plaintiff and another party; to this portion of the answer plaintiff demurs, contending that a joint indebtedness cannot be set up as a defense to a sepa-

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rate one. The law of set-off, as it originally existed, has been materially changed by our Practice Act, but yet it does not authorize a joint debt to be set up as a defense to a separate one, nor a separate debt against a joint one: the debts must be due to and from the same persons. It is true, under our system of practice, a party may set up an equitable defense to an action at law, but as a general rule, the law of set-off is the same in equity as in law: joint debts cannot be set-off in equity any more than at law, against separate debts, unless there be equitable circumstances. (2 Story Equity Jur., sec. 1437; 3 Mason Rep., p. 138; 2 Summer Rep., p. 400.) No such equitable circumstances are shown to exist here, consequently I render judgment for the plaintiff on the demurrer.

HARTLEY vs. WATERHOUSE.—SAME vs. SAME.—WILSON
vs. HARTLEY.

Eleventh Judicial District Court, August, 1854.

MORTGAGE NOTES—PRIORITY OF PAYMENT.

If a mortgage is given to secure several notes, they are to be paid pro rata from the avails of the property. An assignment of the notes will not ensure the full payment of them as they mature, leaving the last to meet the deficiency.

Action brought to settle adverse claims to the proceeds of property sold under a mortgage by virtue of possession of different notes covered by the same mortgage. The facts are reported in the opinion.

_____, for plaintiff.

_____, for defendant.

HOWELL, J.—On the 10th day of August, 1853, C. C. Waterhouse being indebted to John Williams, to the use of Margaret Gish, in the sum of four thousand dollars, and to Jacob Gish, in the sum of two thousand dollars, executed to Williams, to the use aforesaid, two notes, one for two thousand dollars, payable on the 1st day of May, 1854, and the other, for a like amount, payable on the 1st day of August, 1854; and Jacob Gish two other notes, one for one thousand dollars,

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payable on the 1st day of May, 1854, and the other, for a like sum, payable on the 1st day of August, 1854. On the same day, and to secure all of the above notes, he executed to Williams and Gish a mortgage on certain lands in Yolo county, which was duly acknowledged and recorded in the recorder's office.

On the 13th of April, 1854, as appears from the endorsment, Williams assigned to Wilson and Kirkpatrick the two thousand dollar note, falling due on the 1st of May, 1854; and subsequent to that time all of the other notes were assigned to H. H. Hartley. It is agreed that Wilson and Kirkpatrick paid the full amount called for by the note which they purchased, and that Hartley paid for the notes purchased by him, at the rate of thirty cents on the dollar.

On the 14th day of June, 1854, all of the interest that Gish then had in the mortgage was assigned to Hartley.

On one day, the same month, Wilson, Kirkpatrick and Hartley, instituted separate suits, in this court, to recover judgments on their notes then due, and for a foreclosure and sale of the mortgaged premises; and since then, (in the month of August,) Hartley instituted suits, in the same court, to recover judgments on the other notes held by him, and also for a foreclosure and sale of the mortgaged premises.

It is agreed that each party is entitled to judgment for the debt and interest claimed.

It is also agreed that the mortgaged premises are insufficient to pay all of the notes and the interest accrued.

The parties disagree as to the manner in which the moneys to be derived from the sale of the mortgaged premises are to be applied. The attorney for Wilson and Kirkpatrick insists that inasmuch as they received the first assignment, they are entitled to have their note first paid. That if the Court should be of opinion that this position is untenable, then they are entitled to preference as against all of the other notes, except the one thousand dollar note held by Hartley, which fell due on the 1st of May, 1854. Hartley contends that the moneys are to be divided, pro rata, among all the notes. And the application is now made to the Court to settle these differences, and divide the money as in its judgment would be proper under the circumstances.

In support of the proposition that Wilson and Kirkpatrick, being the first assignees, have preference in the application of the proceeds

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of the sale, the attorney cites Cullum *et. al.* *vs.* Erwin, Admr., 4 Alabama R., 452, and Van Rensselaer *vs.* Stafford *et. al.*, 1 Hopkins, ch. R., 569.

In the case cited from 4 Alabama, a mortgage had been executed to Cullum to secure the payment of five promissory notes, falling due at different times. The first note had been paid to Cullum. The second note falling due had been assigned by Cullum to Harding. The two next, to the Bank of Mobile, and the remaining two to the Planters' and Merchants' Bank. The Court below decreed that the assignees of the notes were entitled to priority of payment in the order in which the *notes fell due*, and *that*, the Court declare, is the *principal* question to be determined. Neither party claimed preference by priority of assignment, and the question was not raised or decided by the Court. The Court say that, "when Cullum transferred the second note *falling due* to Harding, if there was no reservation of his interest in the mortgage, the assignment of the note was an assignment pro rata of the mortgage; and if Cullum had retained the remaining notes, and the mortgaged property had proved insufficient for the payment of the entire mortgage debt, his assignee would have been entitled to priority; and being entitled to priority against Cullum, he has the same right against his assignee, as he could convey no greater right than he himself had." Nor does the case cited from 1 Hopkins, 569, support the position contended for by the attorney for Wilson and Kirkpatrick. In that case, Van Rensselaer had sold a tract of land to Van Dusen, with the understanding that when the title passed, Van Dusen was to secure the purchase money by mortgage on the land conveyed. Before the time for making the deed elapsed, Van Dusen agreed with Joseph Wright and Isaac Powell to sell the same land to them; and, therefore, at the solicitation of Van Dusen, Van Rensselaer agreed to make Van Dusen a deed, with the express understanding, and on the *condition* that Van Dusen, on conveying to Wright, should take a mortgage from Wright and wife, in the sum of \$1180, and have it registered *prior* to the mortgage of \$670, (which Van Dusen was taking for his own security,) and to Van Rensselaer. The mortgages were taken as agreed upon, but were both registered at the same time. Van Dusen assigned the \$1180 mortgage to Van Rensselaer, and afterwards assigned the one for \$670 to Stafford and others.

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The Court gives priority to Van Rensellaer, but not upon the ground that he was the first assignee. But upon the ground that Van Dusen received and held the \$1180 mortgage in trust for Van Rensellaer, and that it was the intention, as appeared from the nature of the dealings between the parties, to make Van Rensellaer, by the assignment, the first incumbrancer. The Court say that, "Van Dusen could not by transfer divest or destroy the right which existed between him and Van Rensellaer; and that Stafford and others took the mortgage charged with all the equity which existed against it in the hands of their assignor." If this doctrine be true, and Stafford and others had procured their assignment first, it could have availed them nothing. They would still have been affected by Van Rensellaer's equities, and would have been postponed to him in the distribution of the funds arising from the sale of the mortgaged premises.

But if the authorities cited had fully sustained the position contended for by counsel, I am not prepared to endorse it, or the reasons upon which it is founded, particularly in this case. Here notes had been executed by Waterhouse to two different parties, between whom there was no unity of interest. The debts were several, each owning and claiming in his own right. Neither had a right to affect or control the other's interest. They were secured by the same mortgage, on the same property, and the notes of each fell due at the same time; and the only difference was that one had notes for \$4000, and the other for \$2000. They were each equally protected by the mortgage, and it was evidently so intended by all parties to the transaction at the time the notes and the mortgage were executed. Suppose Waterhouse had executed two mortgages at the same time, one to secure Gish and the other to secure Williams, and they both had been registered at the same instant, would it be contended for an instant, that one mortgage could by assignment or otherwise defeat the rights of the other. If then each mortgagee in separate mortgages is protected, they are equally so where the mortgage is joint. This brings me to the consideration of the second proposition contended for by the attorney for Wilson and Kirkpatrick, viz.: "That the notes first falling due are entitled to preference." In support of this doctrine, 13 Ohio, ²⁴⁰ 440; 8 Blackford, 446; and 4 Alabama, 452, are cited. These decisions hold to the doctrine that the note first due has preference.

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631 The *pro rata* rule is equally as well suited by the cases cited and relied upon by the other party. See 2d Vol. U. S. Eq. Dig. Title Mortgage, Sec. 195 and, 6, and 599; 6 Smedes & Marshall, 139; 6 Howard's R., 320; 17 Sergt. & Rawle, 400; and 10 Smedes & Marshall's R., 631. I am not aware of any decisions in this State, in which the question has been determined, and the state of the authorities leaves it entirely open, to be determined upon general principles.

The principal reason relied upon in the decisions cited by Wilson and Kirkpatrick's attorney, is that inasmuch as the mortgagee, while he held the notes, had a right to foreclose and sell the mortgaged property so soon as the first note fell due, and exhaust all of the property (if necessary for that purpose) in the satisfaction of the note, that by its assignment he has invested his assignee with the same right, and this too, as against the assignees of the notes subsequently falling due. That the mortgagee may have done so is true. That he may have exercised his discretion by waiting until the second note became due, and applied the whole proceeds to its payment, is equally true; or he may have applied the funds *pro rata*. If an unexercised right in the mortgage is to have any influence in determining the controversy between these parties, it applies with as much force to one as to the other. There is nothing in any of the assignments evidencing an intention on the part of either mortgagee in this case, to give a preference to one note over another. If it exists, it is by operation of law, growing out of the fact that one note fell due sooner than another. There is no doubt of the fact, that the lien created by the mortgage, operates as an equal security to all the rates, subjected to be defeated, so far as the notes last falling due were concerned, by exhausting the property for the satisfaction of the first notes. That has not been done. All of the notes are now due; suits have been brought on all of them, and the reason urged in support of priority has ceased. It was a mere advantage, because one note was due and the other not. Because one party could enforce his rights and the other not. Now all parties stand upon an equal footing. They can go into Court at once. They occupy the same position as if all the notes had been made payable at the same time. If that had been so, no one would have questioned the right of each to his *pro rata* share of the proceeds of the sale. The argument is that each assignee has been substituted to the rights

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of his assignor as they existed at the time of the assignment. That is perhaps true, provided the right had been exercised before the other notes become due. But suppose all of the notes had been due when the assignments were made; could either have claimed priority? Surely not, because the only fact that gave priority, no longer existed; the right in one to foreclose and sell, which was denied to the other because of his note not being due. The equities of the parties are equal. The advantage had by the holders of the notes first becoming due, has been lost to them, by the removal of the disability under which the holder of the second notes labored. They all stand upon equal footing, and must all share the proceeds of the sale *pro rata*, and the attorneys for the different claimants will draw up their decrees in that manner, and the clerk will so enter them.

CURTIS vs. RICHARDS.

Twelfth Judicial District Court, May, 1857.

UNDERTAKING.

A bond executed by the sureties, without the principal, is good and valid.

This action was brought on an undertaking executed by the defendants on an appeal to the Supreme Court from a judgment recovered by the plaintiff against David Scannell, in the Superior court of the City of San Francisco. The complaint alleged the recovery of said judgment, the bringing of the appeal, the affirmance of the judgment, &c. The defendants answered by saying they had not any sufficient knowledge or information to form a belief, as to whether the proceedings were had on the appeal or the judgment affirmed, &c.; and they therefore denied the same. Also, alleged if any such judgment was recovered, it was void. Also, that the paper alleged to have been signed by them was insufficient, and without any legal consideration. It appears that Scannell did not execute the undertaking.

The plaintiff demurred to the answer—

1st. Because it did not admit or deny the allegations in the complaint, either positively or from information and belief.

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2d. That the defendants were bound either to admit or deny positively the undertaking set up, as that was within their personal knowledge.

Mastick & Simons, for plaintiff.

J. H. Wells, for defendant.

NORTON, J.—I hold the demurrer well taken, and decree judgment for the plaintiff on the grounds stated in said demurrer,—that a bond executed by sureties without the joining of the principal, is good and valid.

SMITH vs. MAYOR AND COMMON COUNCIL OF THE CITY OF SACRAMENTO.

Sixth Judicial District Court, May, 1857.

CORPORATIONS—TRANSFER OF FUNDS—EMPLOYMENT OF COUNSEL.

Corporations possess not only such powers as are expressly granted, but such as are necessary to carry into effect the powers so expressly conferred.

The City Council of Sacramento have no right to transfer moneys in its treasury from one special fund to another, and the abuse thereof will be restrained by injunction.

The Council have an undeniable right to employ Counsel, other than the City Attorney, to protect its interest abroad, although the Charter may not specially provide therefor.

Gass, Sunderland & Long, for plaintiff.

Moore, City Attorney, for defendants.

The facts are fully reported in the opinion :

MONSON, J.—On the eighth day of April last, the Mayor and Common Council of the City of Sacramento, passed an Ordinance appropriating \$5,000 for the purpose of employing Alpheus Felch to contest before the Supreme Court of the United States the claims of John A. Sutter to land within the corporate limits of said City, and the Mayor was authorized to draw his warrant for the same upon the Contingent Fund. There being no money in that fund to meet the payment of this warrant, the Mayor and Common Council ordered \$5,000 to be transferred from the Debt and Interest and Sinking Funds for that purpose. The plaintiff, in his complaint, charges fraud and collusion between certain parties of the defendants in procuring the passage of

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the ordinance. No proof, however, was adduced to support the charge, but the same was abandoned at the hearing.

The first question involved is, the power of the Mayor and Common Council to make the appropriation referred to; in other words, whether they have the right to appropriate money and employ counsel to attend to cases pending before the Supreme Court of the United States, in which the City is interested? It is urged by the plaintiff, that the people, under the charter, have elected a City Attorney, and that the Mayor and Common Council have no authority to employ any one to perform his duties, or to aid and assist in the performance of them. Even if this were admitted, can it be well contended that it is the duty of the City Attorney to proceed to Washington City, and there remain, watch and argue cases pending before the Supreme Court of the United States, in which the City may be interested? Who would attend to his duties here during his absence? The Legislature in requiring the City Attorney to attend to all suits in which the City is interested, intended suits or proceedings here—not in the City of Washington. The Mayor and Common Council, therefore, in the passage of the ordinance in question, were not attempting to employ Mr. Felch to perform, or to aid or to assist in the performance of any duty properly belonging to the City Attorney. If then, the City is interested in the question of the Sutter claim, have not the Mayor and Common Council the authority to employ some one to attend to her interest in the Supreme Court of the United States? Plaintiff says no, for the reason that no such authority is expressly given to them by the charter. Corporations possess not only such powers as are expressly granted, but such as *are necessary to carry into effect the powers* so expressly conferred. By the charter, the City Council is authorized to “make by-laws and ordinances not repugnant to the Constitution and Laws of the United States, or of this State—to make appropriations for any object of City expenditure—to purchase, receive and hold for the use of the City, real and personal estate, &c., and to pass such other by-laws and ordinances for the regulation of said City, as they may deem necessary.”

Do we not find here abundant authority for the passage of the ordinance in question? If the City Council have the right to purchase and hold real estate, have they not the right to protect it, and, if neces-

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sary, appropriate money for that purpose? I think they have. If I am correct in this, then we have only to enquire whether the City of Sacramento, as a corporation, is interested in the rejection of the Sutter claim to the land within the corporate limits. If not, then the appropriation would be an unjustifiable abuse of authority, and call for the interposition of the law. In determining whether or not the City is interested, the Common Council have the power to exercise a reasonable discretion, and this Court has no right to interfere merely because it differs, perhaps, in opinion from them. I may think it more advantageous to the City and her citizens, to have the claim of John A. Sutter to the lands within her corporate limits, confirmed; that the appropriation in question is an extravagant and useless one—just so much money thrown away; of no benefit or advantage even to those who most desire the rejection of the Sutter title. But yet, if the defendants have not grossly abused that discretion which they possess, I cannot interfere. If the Mayor and Common Council held an undisputed Sutter title to all the land which the City is now in possession of, I, perhaps, would be justified in holding that the City of Sacramento had no interest either in the rejection or confirmation of the Sutter claim—for if confirmed, the City would have the title; if rejected, then the lands within the corporate limits would become a part of the public domain, and subject to pre-emption by the corporate authorities for the use and benefit of the occupants. The pleadings show, however, that the City does not hold the undisputed Sutter title to the lands which she is now in possession of. That portion of the City known as the Levee, embracing the City water front, &c., is claimed by others, who allege that they have the Sutter title thereto. This is a valuable piece of property, (especially to the City,) upon which the corporate authorities have expended large sums of money in making improvements, and from the use of which a large revenue is annually derived. The defendants say that if the Sutter title is confirmed, the right of the City to this valuable property will be disputed,—the city subjected to protracted and expensive litigation, and her right to the property endangered, if not lost. The plaintiff and other citizens may think that these results will not follow—that provided the Sutter claim is confirmed, the right and title of the City to the Levee and water front cannot be successfully contested. The Mayor and Common Council, however, appear

Von Reynigom vs. Revalk.....	73

to think otherwise, and in so thinking I am not prepared to say that they are so grossly abusing that discretion which, by law, they are invested with, as to justify judicial investigation. I would here dissolve the injunction, but it appears from the pleadings, and was admitted upon the hearing, that, for the purpose of meeting the warrant drawn in favor of Mr. Felch, the Common Council has transferred (borrowed as they call it,) \$5,000 from the Debt and Interest and Sinking Funds to the Contingent Fund. In this the defendants acted without authority of law, and in violation of good faith—both of which funds must and should be held sacred for the purposes for which they were created. They were authorized for a certain specific purpose, and the City Council have no right to touch or use them for any other. If it is true, as stated, that previous City Councils, in similar cases, have acted in like manner, while it affords no excuse—it yet shows and proves that it is full time that the Courts should interpose and prevent the repetition of such unauthorized acts. The Mayor and Common Council must be restrained from using or appropriating the money in or belonging to the Debt and Interest and Sinking Funds for any purpose whatever, other than such as for which they were created. When the defendants have replaced the money transferred to the Contingent Fund from the Debt and Interest and Sinking Funds, and the same is satisfactorily proven to me, I shall dissolve this injunction so far as to permit the Mayor to draw his warrant in favor of Alpheus Felch upon the General Fund.

VON REYNIGOM vs. REVALK.

Fourth Judicial District Court, May, 1857.

HOMESTEAD—PRIORITY OF MORTGAGE.

After death of wife without issue, husband inherits wife's interest in homestead by right of survivorship.

A mortgage executed by the husband *alone* on homestead property and recorded during life time of wife, takes priority of a mortgage executed on same property by husband and wife, but not recorded until after wife's death.

On the 7th day of September, 1854, John Revalk married, and

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from that day forward resided with his wife upon property previously owned by Revalk in the city of San Francisco. On the 11th day of December, 1854, Revalk *alone* executed a mortgage on the premises to defendants, Charles W. Kraimer and John Eisenhardt for \$4000, which mortgage was immediately recorded. Subsequently, on the 9th day of July 1856, *Revalk and wife* executed a mortgage to plaintiff for \$1000. On the 10th day of December, 1856, Revalk's wife died, leaving no issue, and on the 11th day of December, 1856, plaintiff's mortgage was put upon record.

This action was brought in the month of March, 1857, by plaintiff, to foreclose his mortgage as against defendant Revalk, the mortgagor, and Kraimer and Eisenhardt, mortgagees, claiming a prior lien to plaintiff's mortgage on premises. Default having been entered as against defendant Revalk, the contest came up as between plaintiff and defendants Kraimer and Eisenhardt, on the score of priority.

A Jury being waived, the cause was tried by the Court.

Plaintiff relied upon the following points:

That on the 11th day of December, 1854, the property in question being the *homestead* of Revalk and wife, the mortgage executed on that day by Revalk without the signature and acknowledgment of his wife, was *absolutely void*. That from the death of Revalk's wife defendant's mortgage gained no additional validity, but must stand or fall as of the date of its execution, and that plaintiff held the only instrument that could by action of the law become a lien upon the premises.

Pixley & Smith, for plaintiff.

Sidney V. Smith, for defendant.

HAGER, J.—This is a controversy between the creditors of John Revalk as to priority of mortgage on certain premises in the city of San Francisco. There is no doubt but that the property in question was the homestead of Revalk and wife from the 7th day of September, 1854, to the 10th day of December, 1856, upon which day the death of Mrs. Revalk by rule of survivorship, vested the entire estate in her husband, and defendant's mortgage being already upon record, must of necessity take priority to plaintiff's mortgage which did not

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become matter of record until the 11th of December, (one day after Mrs. Revalk's death.) Had plaintiff's mortgage been placed upon the records before Mrs. Revalk's death, his rights might have been thus preserved, but this neglect on his part forfeits in my opinion, whatever advantages he may have acquired by virtue of the wife's signature; and applying the statute as to conveyances and its requirements to this case, I find that defendants Kraimer and Eisenhardt hold the first mortgage and are entitled to have their lien first satisfied out of the proceeds of the mortgaged premises.

PHELAN vs. SMITH.

Fourth Judicial District Court, May, 1857.

INJUNCTION.

It seems that a State Court has no right to enjoin the sale on execution of the United States Court.

Motion to dissolve injunction.

This was a suit to obtain a decree of this Court to enjoin defendants from selling or interfering with certain water lots situate in this city. It is alleged in the complaint that plaintiffs have been the owners in fee of an undivided one-third interest in the beach and water lots numbers 514 and 515, since August, 1856; that the defendant, Peter Smith, who is a non-resident, in March, 1857, obtained a judgment in the United States Circuit Court against James Van Ness and Isaac N. Thorne, upon which judgment an order of sale was issued, and that under that order, defendant, McAllister, has seized upon and advertised the lots in controversy for sale on the 29th day of April, 1857; that such decree was recovered upon foreclosure of a mortgage; that neither of these plaintiffs were made parties defendant in that suit, nor had they any notice of the pendency of that suit or of the existence of the decree, until their attention was called to the advertisement of sale above referred to; that before the plaintiffs acquired their interest in the lots, they were informed by James Van Ness, who was the attorney in fact of the defendant, Peter Smith, that the mortgage had been paid and satisfied; that at the time of the com-

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mencement of the suit of Smith vs. Thorne and Van Ness, there were several persons interested in the lots, and owing to their not having been joined as parties defendants, no defense was put in, as Thorne and Van Ness were in no way interested in defending the suit; and further, that if a defense had been put in, the fact that a mortgage had been fully paid and satisfied, could have been clearly proved. It further avers that the decree so obtained was fraudulent and void as against these plaintiffs; that the defendant, Smith, is absent from the State, and defendant McAllister threatens to consummate the sale, and will do so unless restrained by this Court, which sale, if consummated, would work serious injury to plaintiffs, by creating a cloud upon their title. A preliminary injunction was granted restraining defendants from going on with the sale of the property.

C. M. Bowman and C. McC. Delany, for plaintiff.

Gregory Yale, for defendant.

HAGER J.—The injunction in this case was granted in the first place with hesitation. I had limited the writ, so that no injury could result to the defendants, as all parties could have an opportunity to be heard on a motion to dissolve without much delay. And moreover, it was made to appear that the U. S. Circuit Judge, in whose Court the decree of foreclosure had been entered, was absent from the State; and an action by original bill could not be maintained in a Federal Court for the reason that the parties were residents of this State. Upon these considerations a temporary injunction had been allowed. The parties had been heard before the Court upon a motion to dissolve the injunction. This motion must prevail. Indeed, the plaintiff's counsel have seemed to take the fact for granted, that the injunction would not be upheld in this Court. The injunction is dissolved.

GODFREY vs. BADGER.

Twelfth Judicial District Court, May, 1857.

CONTRACTS—LEX LOCI—TENDER.

The *lex loci contractus* should prevail over the *lex fori* where there is a variance between them in regard to the law of demand of payment on a promissory note.

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An answer setting forth an averment "that the money was ready at the time and place to pay if the demand had been made" is insufficient. It was only a tender and should be pleaded with a *proferet in curia*. It is not a matter of defense.

The plaintiffs are merchants, doing business in Boston, Massachusetts and the defendant is a resident merchant of San Francisco. The present action was instituted by them to recover \$2,867, due on four promissory notes, made by defendant in September, 1856, by his duly authorized attorney in the city of Boston. The suit was commenced on March 26th, last, and an amended complaint filed on the 13th April. Another action by the plaintiffs against defendant for \$478 61, alleged to be due and owing on another note, made in the same manner as the four mentioned in the last suit, was instituted on the 15th April. The defendant demurred on the ground that the complaints did not state facts sufficient to constitute causes of action. An answer was also put in by defendant. The other facts in the cases appear in the opinion.

W. K. Osborne, for plaintiff.

Shafter, Park & Shafter, for defendant.

NORTON, J.—The Supreme Court of this State, in the case of *Wild v. Van Valkenburg*, decided at the last January term, adopted the English rule that in an action against the maker of a promissory note, it is necessary for the plaintiff to aver and prove a demand at the place of payment specified in the note. In order to avoid the application of this rule to the present case, the plaintiffs have averred that by the laws of Massachusetts, where the notes were made and are payable, such a demand is not necessary. The defendant demurs, and the question presented is whether the case is to be governed by the law of the place where the contract was made and was to be performed, or by the law of the place where the action is tried.

The English Courts base their rule upon the ground that it is the legal effect of the contract that a demand shall be made at the place specified, and that such demand is a condition precedent to the liability of the promissor. The Massachusetts Courts, on the contrary,

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hold that although the party to such a contract is not bound to pay anywhere else, yet the contract to pay at such place is unqualified and does not depend upon the condition of a demand being made. Whichever may have the better reason, they both consider the question as depending upon the nature and legal effect of the contract. This being so, it seems clear that the laws of Massachusetts, where the contract was made and was to be performed, and in reference to which the parties must be presumed to have contracted, must govern instead of the laws of the State where the action is tried.

Judge William Kent in a note [3d Kent's Com. 7th ed., p. 122,] referring to the case of *Sands v. Clark*, [65 Eng. Com. Law Rep. 751,] where the English rule was applied to a note made and payable in New York, expresses this opinion to the same effect in the following emphatic terms: "It seems not to have occurred to the counsel or the court, in this case, to inquire what was the *lex loci contractus*, which was certainly the controlling law."

The note on which the action of *Wild v. Van Valkenburg* was brought was made and payable in New York, and the Supreme Court were aware that laws of New York are like those of Massachusetts in this respect, but the point now in question was not presented or considered, nor was the *fact* of the law of New York presented by the pleading so that it could properly have been made the ground of any decision in that case, and hence the present case is not affected on this point by that decision.

The demurrer to the complaint must therefore be overruled.

The defendant has also filed an answer, in which he avers, as to three of the notes, that he had the money at the time and place, ready to pay if a demand had been made. The plaintiffs demur to this answer, and I think the answer insufficient. If the effect of the contract, construed by the laws of Massachusetts, is merely that the maker will pay at a particular time and place, then his readiness at the time and place is, at most, but a tender, and requires to be pleaded with a *profert in curia*. Such a readiness cannot be more effectual than an offer of the money directly to the payee would be, in the case of a note payable generally. If the English rule should be held applicable to this case, and a demand should hereafter be made at the place specified, and an action brought in default of payment, it will

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become necessary to decide what was the effect of the defendant having been ready at the *time* and place specified. Was the debt absolutely discharged, or was it only a tender? A supposition that the former result would ensue from a failure to demand, at the *time* and place, appears to have influenced in some degree, the American Judges in adopting a rule the opposite of that adopted by English Judges (*Wallace v. McConnell*, 13 Pet., 136—*Carley v. Vance*, 17 Mass., 389); but the latter will probably be held, in this State, to be the only effect of a readiness to pay, in default of a demand, at the *time* and place, and the defendant will be obliged to plead such a fact with a *profert in curia*, or, at least, with an averment that the money was left at the place specified, subject to any future demand of the payee. The demurrer to the answer must be sustained.

EZEKIEL vs. MICKLE, County Auditor.*Fourth Judicial District Court, May, 1857.*

REDUCTION OF SALARY.

The Legislature have the power to reduce the fixed salary of a public office before the term of the incumbent expires.

This was an application for a *mandamus* to compel Mr. Mickle to audit and allow the claim of plaintiff on the County Treasury for \$150, salary for the month of April last as Secretary of the Fire Department. The affidavit of Mr. Ezekiel sets out: That he is the Secretary of the Fire Department of the City and County of San Francisco, and, as such, is *ex officio* Fire Warden. That he was elected to said office on the 24th day of November, 1856, for the term of one year. That the salary allowed by law is \$1800 per annum. That affiant presented a monthly demand for the month of April, 1857, to Etting Mickle, Auditor of the County, for his salary for said month, but the said Auditor refused and still refuses to audit and allow said demand.

The answer of the Auditor states that the Secretary of the Board of Delegates of the Fire Department is entitled by law to receive a salary of \$1500 per annum, and no more; and the Auditor is ready

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to audit and allow the monthly demand of said Secretary for the monthly proportion of said salary, whenever he shall thereto be requested according to law.

McDougal & Sharp, for plaintiff.

F. P. Tracy, County Attorney, for defendant.

HAGER, J.—It appeared, on the argument, that the Legislature, in 1855, created the office of Secretary of the Fire Department, who was to be *ex officio* Fire Warden, and attached to it the salary of \$1800 per annum. The Act of March 25, 1857, concerning the Fire Department, recognizes this office, and does not change the compensation before allowed. But the Act passed April 18, 1857, amendatory to the Consolidation Act, allows a salary of \$1500 per annum to the Secretary of the Board of Delegates, who is required to perform the duties of Clerk of the Chief Engineer, and also to discharge the functions of Fire Warden. The same Act prohibits the payment of any other salaries except as provided for therein.

The question arising is, whether the present incumbent, Jacob Ezekiel, who was elected to the office for one year from the 24th day of November, 1856, is entitled to receive the salary at the rate of \$1800 for the whole term, or whether from the passage of the Act reducing the salary, he is only entitled to the salary of \$1500.

The act having changed the salary of the office without making any special mention of this incumbent, or reserving his right to the prior salary, and prohibiting any other salary to be paid, necessarily operates as a reduction in his salary, and the Legislature who created the office have a right to abolish the same at their pleasure before the term of office to which he was elected should have expired; also to increase or diminish the salary of the office at their pleasure.

Let the following order be entered: That said Etting Mickle do audit and allow said monthly demands of said Ezekiel, Secretary as aforesaid, on account of his salary, at the rate of \$1800 per annum, up to the 18th day of April, 1857, and at the rate of \$1500 per annum after that date.

De Bridges vs. Hueston.

DE BRIDGES vs. HUESTON,

Twelfth Judicial District Court, June, 1857.

STREET REPAIRS.

Under the Consolidation Act of San Francisco, notice must be given to the property holder to repair the street himself, before he can be held liable and his property seized for any assessment by virtue of repairs made.

This was a bill to enjoin the Sheriff from proceeding to sell a lot on California street, between Davis and Drumm, which the Sheriff had advertised for sale under a warrant issued by the Police Judge, and countersigned by the Superintendent of Streets and Highways, to coerce the payment of \$1082, by a sale of the lot, in favor of the defendant, Hueston, a Street Contractor. The warrant was dated on the 26th of March, 1857, and was issued under the provisions of the 50th section of the Consolidation Act, which provides as follows :

“ If such delinquent assessment or assessments shall remain unpaid for five days thereafter, the Police Judge shall, on the application which it shall be the duty of the Superintendent to make, carefully examine the aforesaid record and also the record of assessments, and finding the proceedings to have been legal and free from fraud on the part of the Contractor, shall issue his warrant, to be signed by him and countersigned by the said Superintendent, directed to the Sheriff of said city and county, briefly setting forth the delinquent assessment or assessments, the amounts thereof remaining unpaid, the name or names of the owner or owners, if known, and an accurate description of the property liable therefor, and commanding the said Sheriff to collect the amount of such delinquent assessment so remaining unpaid, with costs, including his legal fees, and fifteen dollars, to be collected and paid over to the Superintendent for his services, and also five per cent. damages upon the amount remaining due to the Contractor, by sale of the property liable therefor, and described in said warrant, in the same manner as real estate is required by law to be sold upon execution, and out of the moneys made, to pay over the amount or amounts due to the Contractor, with the said five per cent. damages ; which warrant, after having been recorded by the Superintendent in full in his office, shall be delivered to the Sheriff.”

The 51st section gives the warrant the force and effect of an execu-

tion upon a judgment or decree entered up in a Court of Record, and makes the deed to be executed by the Sheriff *prima facie* evidence of the facts recited, after requiring the Sheriff briefly to "refer to the essential steps previous thereto."

The case, made by the pleadings and evidence was, that at the request of all the owners of property on each side of California street, from the center of Davis to the center of Drumm, with the single exception of the plaintiff, in October, 1856, petitioned the Board of Supervisors, then consisting of the Justices of the Peace, to advertise for sealed proposals to fill in, sewer and plank the street, under the provisions of the 4th Chapter of the Consolidation Act. The petition was granted, and the contract awarded to the defendant, Hueston, as the lowest bidder. A contract was entered into between him and the present Superintendent to do the work, and approved by the present Board of Supervisors, and the work satisfactorily performed under it. All the parties who petitioned have paid.

The plaintiff is a citizen and resident of France, and one of the firm of Pioche, Bayerque & Co. acts as his agent. The agent did not forbid the work in front of the plaintiff's property, but denied his authority to sign the petition with the other property holders. The Bill admits that the plaintiff was willing to keep in repair the filling and planking of the street in front of the lot, at his own expense, "*but not fill, sewer and replank the same.*"

It was in proof that the street could not be sewered unless it was filled in front of this lot, which was situated about the middle of the block.

The bill charged that the work was not performed in accordance with the provisions of the sections 40, 41, 42, 43, 44, and 53, of the Act, as recited in the contract, and sets forth, specifically, 1st. that there was no proper publication, so as to give the property holders an opportunity to protest against the work: 2d. that the petition by the property holders was not made in the manner provided: 3d. that no estimate of the cost of the work had been made public before the order to make the improvements had been made by the sureties, and that the contract is void for want of such proceedings: 4th. that the Superintendent failed to fix the time, within which, after the contract was signed, to permit the owner of the lot to perform the work himself,

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at his own expense, as required by section 54: 5th. that the Contractor failed to make a return of the performance of his work, under the contract, duly verified: 6th. that the Superintendent, after issuing the warrant, did not record it, in a book to be kept for that purpose: 7th. that the Police Judge issued the warrant wrongfully because these several pre-requisites had not been complied with.

The bill charges that by reason of the operation of the deed from the Sheriff, a cloud will be created upon the title to the lot, and therefore prays an injunction to restrain the sale.

The answer denies specifically the allegations respecting the irregularities in making the contract; and, as respects the 3d objection, that no proper estimate was made of the cost of the work, it avers, that the "said property holders, so petitioning as aforesaid, made a careful estimate of the costs of said work and improvements, which said estimate was acquiesced in, approved and adopted by the said Superintendent of Public Streets and Highways, and that said estimate was duly made public before the said order was passed."

The answer also sets up a claim, for work and labor, upon an implied promise to pay the value of such improvement. This claim was not passed upon by the Court, and, after the decision, was withdrawn by stipulation.

Some constitutional objections were raised, in argument, by plaintiff's counsel, against the provisions of the Act relating to the constitution of the Board of Supervisors, composed of the Justices, who took the preliminary steps in awarding the contract, and also that the mode adopted to force the payment, was to take property without due process of law.

These constitutional objections were not decided by the Court. The only irregularity noticed in the decision was the 4th, namely: that the Superintendent failed to fix the time within which, after the contract was issued, to permit the owner of the lot to perform the work himself, at his own expense, as required by section 54.

The decision was made on this point alone, although the bill avers that the plaintiff was not willing "to fill, sewer and replank the same," (the street in front of the lot.)

There is no averment of excessive charges for performing the work, or of an unworkmanlike manner in executing it.

Burnell vs. Gregory.

Parsons & Sawyer, for plaintiff.

Gregory Yale, for defendant.

NORTON, J.—The plaintiff's counsel in this case has gone very deeply into the question of the constitutional rights of parties, which are of serious import; but which I decline to consider, because the case must be decided upon other grounds. The object of the provisions of the Consolidation Act, in respect to street repairs, is, that the city is to be relieved from expense, and that property holders shall be compelled to pay. It provides that, after careful assessments, the property holders are to be called upon, notified to do the work or have it done, and, on default, that they shall suffer the severe consequences of having their property sold to satisfy the claims of such persons as do the work, &c. In this case, there are many objections to the regularity of the proceedings, and it appears that there was no notice given to the property holder to do the work himself. On the other hand, it is claimed that the property holder stood by and saw the work done, and, therefore, has no right to ask the aid of chancery. The decisions, however, as to this latter point, have been based upon grounds which do not arise in the present case. On account of the want of notice, and consequent non-compliance with the requirements of the Consolidation Act, the injunction restraining the sale is made perpetual.

BURNELL vs. GREGORY.

Twelfth Judicial District Court, June, 1857.

FORCIBLE ENTRY.—DEMAND.—SUB-TENANT.

Forcible entry and detainer cannot be extended to any but the real occupants.
A demand of rent must specify the amount due.

One obtaining possession of property from a lessee, by collusion, holds under the lessee.

George Scott and Christopher Hutchinson, on 4th of May, 1855, leased to George D. Gregory by parol lease, from month to month, certain premises on the south-east corner of Howard and Hubbard

Burnell vs. Gregory.

streets. The property was then in possession of Thompson, as tenant of Lawrence Webb, the executor of Wembom, who also claimed the fee. Gregory took possession and a few weeks after was evicted by Webb. He then brought suit for forcible entry and detainer, obtained judgment, and the case was appealed, pending which Gregory was paid a sum of money by Thompson to retain possession.

July 24th, 1856, Scott and Hutchinson sold to plaintiff, who brought this suit as above.

Trial by the Court. Upon plaintiff's counsel closing his case, defendant's counsel made a motion to dismiss proceedings.

H. B. Janes, for plaintiff.

R. C. & D. Rogers, for defendant.

NORTON, J.—This case has been certified to this Court from a Justice's Court, upon the question of title. I am not sure that this Court has jurisdiction. The action of forcible entry and detainer is regulated by statute, which provided that when the title is involved, the Justice shall proceed no farther. It is questionable whether this suit has been properly certified, but as I shall decide this case on another ground, it is unnecessary to pass upon this.

The defendants, Haynes and Gregory, are improperly joined; upon the ruling of the Supreme Court in *Treat vs. Stuart & Bowman*, 5 Cal. R., 113, Thompson alone being in possession.

This suit was brought by a landlord, not against a tenant entering and detaining from him, but against a person entering and detaining from his lessee. The lessee, whose lease has not expired, might have brought forcible entry and detainer, but the landlord cannot under the circumstances. It appears that there has been some collusion between the landlord's lessee, and the person in possession. I should say that when persons gain possession of property by any collusion whatever, with a lessee, they hold under the lessee.

There are certain forms prescribed by law in cases of this kind, one of which is, a demand for rent in writing, three days before suit. The demand in this case is defective in not specifying the amount of rent due. The requirements of the law were not therefore complied with in this case.

Judgment for the defendant.

Heslep vs. Brayton.

HESLEP vs. BRAYTON.

Twelfth Judicial District Court, June, 1857.

STAY OF PROCEEDINGS.

Serving a notice of motion for a new trial, operates *per se* as a stay of proceedings for the five days within which a statement is to be filed.

A motion for a new trial need not be filed with the Clerk of the Court. It is only required to be served.

Motion to set aside an execution as having been improperly issued.

Heslep brought suit against Brayton, and having recovered a judgment thereupon issued execution and levied upon the property of the defendant. The defendant however, within the two days allowed by law, gave notice to the plaintiff of a motion for a new trial, but did not file the same with the Clerk of the Court. The plaintiff had proceeded to have his execution issued upon the ground that this notice not being so filed was such an irregularity as precluded him from further moving in the case, and also that it did not operate as a stay of proceedings.

Heslep, for plaintiff.

H. B. Janes, for defendant.

NORTON J.—The question which presents itself in this case is purely one of practice and has as yet been unsettled in this Court. I have taken occasion to consult with his Honor, Judge Hager, of the Fourth District Court, as to the best rule to adopt in these cases, as this decision will set at rest a point which has been somewhat doubted heretofore. We desire to establish some fixed rules for the future guidance of the bar in the absence of statute regulation. The Practice Act does not require the notice of a motion to be filed with the Clerk, the service thereof upon the adverse party I shall hold to be sufficient, and that until the five days elapse in which a party is required to file a statement on the motion, all proceedings must be stayed on execution. A party may enter his judgment, but no execution can issue until the five days elapse. Let the execution be set aside.

Luning vs. Gorham.

LUNING vs. GORHAM.

Twelfth Judicial District Court, June, 1857.

JURISDICTION.

Implied consent will not transfer a cause from the Superior Court to the Twelfth Judicial District Court.

This action for the foreclosure of a mortgage was originally instituted in the Superior Court of the City of San Francisco. Upon the abolition of the Superior Court by the Legislature, summons being served, the plaintiff obtained a written consent from the defendant transferring the suit to the Twelfth Judicial District Court. The consent, however, failed to assign any cause of transfer.

The defendant saw proper to demur on the ground of want of jurisdiction.

Bowman & Gray, for plaintiff.

G. F. & W. H. Sharp, for defendant.

NORTON, J.—The demurrer is well taken as the consent did not show that the action was transferred upon the ground assigned by the act, and that the implied consent of the parties could not confer jurisdiction. Let the proceedings be transferred to the Fourth District Court.

THE PEOPLE OF THE STATE vs. BELITCH.

In the Court of Sessions, in and for the County of Butte, June, 1857.

ATTEMPT TO BRIBE.

An indictment charging defendant with an attempt to bribe a public officer must allege the offer of something of a *valuable* nature.

Indictment for an offer and attempt to bribe the District Attorney of said County.

Judge Lewis, Presiding.

The People of the State vs. Belitch.

The indictment was in the usual form of accusation against the defendant and alleged, that "the said John Belitch on or about the 10th day of April, A. D., 1857 at Oroville, County of Butte, and before the finding of this indictment, did unlawfully, wilfully, and corruptly offer and attempt to bribe one J. J. Kleine then and there being an officer, to wit: the District Attorney of Butte County." After stating the case pending in respect to which the bribe was offered, the indictment proceeded as follows: "by then and there telling and promising the said J. J. Kleine, District Attorney as aforesaid, that he the said John Belitch would give the said J. J. Kleine, District Attorney, as aforesaid, *"something out of his pocket,"* if the said J. J. Kleine would do something for and in favor of the said B. Macinos, &c."

To this indictment, a demurrer was put in by the defendant, on the ground that the acts charged did not amount to a public offense.

W. H. Rhodes, for defendant.

J. J. Kleine, for the State.

J. E. N. LEWIS, J. The indictment in this case is certainly defective, in not charging that some valuable thing as a promise was offered.

Bribing at common law is a misdemeanor and in strict sense, says Hawkins, "is taken for a great misprision in one in a judicial place taking any *valuable* thing except meat and drink of small value of any man who has to be before him in any way, for doing his office, or by color of his office." Roscoe's Crim. Ev. 326. 4. Black Com. 139. Judicial Law Dict. vide "Bribing."

This *valuable* thing has been specified in the 85th section of the Act concerning Crimes and Punishments passed April, 16, 1850. Comp. Stat. 654, as follows: "If any person shall directly or indirectly give any sum or sums of money, or any other bribe, present, or reward, or any promise, contract, obligation or security for the payment of any money, present or reward or any other thing, to any Judge, Justice of the Peace, District, or County Attorney," &c.

The 86th section, then makes "*an attempt or offer to bribe*" an

Hayden *vs.* Davis.

offense, and punishes it by fine and disqualification to hold office. It hence appears that before a conviction can be had for an attempt or offer to bribe, some act must be charged, which had it been consummated would have constituted the crime of Bribing.

In the case before the Court nothing *valuable* and no promise to give any thing valuable seems to have been offered to the District Attorney; nor was there any act done which, if carried into effect, would have come up to the completion of the statutory offense.

Under an English statute precisely similar to the act under consideration, it was held that some "particular species of reward" must have been offered. Russell on crimes, vol. 1. 157, remarks, "It seems that a declaration upon this statute must state what the bribe was, and specify that the defendant took money or some other particular species of reward, and where it stated generally that the defendant did receive *a gift or reward*" in the disjunctive it was held bad, and that the defect might be taken advantage of, in arrest of judgment, the charge being of a criminal nature." The defendant promised to "*give him, the District Attorney, something out of his pocket,*" now, *non constat* that he had anything of value in his pocket.

The demurrer must therefore be sustained and the defendant discharged.

HAYDEN *vs.* DAVIS.

Twelfth Judicial District Court, May, 1857.

REPLEVIN—BAILEE.

In an action to recover personal property, the only essential parts are, that the defendant has in his possession property belonging to the plaintiff, which he wrongfully refuses to deliver up. The mode in which he obtained possession is an immaterial fact and need not be proven as alleged.

An action for claim and delivery of personal property, most nearly resembles the old action of *detinue*.

The bailee is estopped from setting up title in a stranger, and there is no exception to the rule, even when the bailor has no title or right of possession, and has obtained possession tortiously and fraudulently, and the bailee is notified of the bailor's want of title, and delivery to the bailor is forbidden by the person having the title and right of possession.

This was an action brought to recover the possession of personal property, and damages for the taking and detention thereof.

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The complaint alleges a wrongful taking ; does not allege where taken or detained, and does not state the value of the property.

The other facts are stated in the opinion of the Court.

J. B. Hart, for plaintiff.

Bristol & Spencer, for defendant.

NORTON, J.—The plaintiffs, by one of their firm, commenced a negotiation with Uriah Edwards at Petaluma, for the purchase of a quantity of wheat, and, before the bargain was completed, took the wheat from the premises of Edwards in his absence, and subsequently delivered it to the defendant, to be transported to San Francisco and there to be delivered to the plaintiffs. The wheat was brought to San Francisco by the defendant, and there Edwards interfered and demanded the property, and forbade its delivery to the plaintiffs. The defendant thereupon, refused to deliver the wheat to the plaintiffs, when this action was brought to recover it, in which the defendant sets up the title and claim of Edwards as a defense.

An objection is taken to the recovery under the complaint in this action, because the wheat is alleged to have been wrongfully taken by the defendant from the plaintiffs, whereas the proof is that it was delivered to him as a bailee. Under the old system of pleadings, this objection, in some actions, would be fatal, but in our action to recover personal property, the only essential facts are that the defendant has in his possession property belonging to the plaintiff which he wrongfully refuses to deliver up. The mode in which he obtained possession, is immaterial, and an erroneous statement of this immaterial fact, may be disregarded.

In the old action of detinue, which our action most closely resembles, the allegation that the property came to the defendant's hands by finding, was not traversable, and was scarcely ever true in fact.

On the merits, the plaintiffs claim that the defendant is estopped from setting up the title of a third person against the persons from whom he received the property as a bailee.

The general rule of law is well settled to this effect upon authority, but it is said an exception exists in a case where the bailor obtained the possession of the property wrongfully, and two cases are cited to

Nutting vs. Scannell, Sheriff.

support the proposition. One of these cases, (9 Bingham, 378, note,) was a controversy between the assignee of a bankrupt and a person who had obtained possession of the property by collusion with the bankrupt, and delivered it to a bailee, and the decision appears to have been influenced by the peculiar relation of the parties, and character of the fraud, and made without consideration. The other case (9 Wharton, 418,) is very much in point, and the subject is examined at large by Judge Kennedy. His reasoning, however, would go not merely to establish the exception, but to overthrow the rule,—although he acquiesces in the soundness of the rule. And indeed, it is not easy to see any reason why a bailee should be estopped from showing a want of title in his bailor, on any ground, if he is allowed to do it on some particular ground. I think the rule must stand in its integrity, or be displaced altogether. In that case, the property had been actually delivered up to the rightful owner before the suit was brought, which is not the case in this, and although the judge does not make that a controlling circumstance, I think it sufficient to detract much from the influence of that case, as applicable to this. He admits that the bailor should not be allowed of his own motion, to set up the title of a third person, and there does not appear to be any substantial difference between that and setting up the title, with the addition that a claim has been made under it. At least, the bailee should transfer the property to the rightful owner, either voluntarily or by coercion of law, before he can be heard to dispute the title of the persons from whom it was received.

There must be finding that the plaintiffs are entitled to a judgment for the possession of the property, or its value in case a delivery can not be had.

NUTTING vs. SCANNELL, Sheriff.

Fourth Judicial District Court, May, 1857.

EXEMPTION OF MECHANICS' TOOLS—ESTOPPEL.

A judgment debtor is not bound to notify the Sheriff of his claim to the property as exempt from execution, before the day of sale.

The jury have the right to determine what property is "tools and implements of a mechanic, necessary to carry on his trade," under the statute.

Nutting vs. Scannell, Sheriff.

This was an action in the nature of a replevin, to recover back a certain amount of tools and implements, valued at \$600, used by the plaintiff in the prosecution of his business as a blacksmith in this city, which he claimed as exempt from execution. It appeared by the testimony in this case that Conroy & O'Connor recovered judgment against plaintiff, and by virtue of an execution, the defendant seized the property now in controversy. The tools and implements remained in the possession of the plaintiff until the day previous to the one they were advertised for sale, when the plaintiff notified the Sheriff that he claimed the property to be exempt from execution under the laws of this State.

Two questions presented themselves in this case :

1. It was contended by the defendant that the principle of estoppel debarred the plaintiff from maintaining this action, by neglecting or refusing to notify the Sheriff up to the day antecedent to the sale, of the fact that he claimed them as necessary implements of trade.

2. It appearing that the property sought to be recovered back included several bellows, several anvils and a punching machine, it was insisted by the defendant, that as the statutes provide only for necessary tools to be exempt from forced sale, and machinery was not freed thereby, the plaintiff was only entitled to a modicum of the property seized.

Trial by jury.

Janes, Lake & Boyd, for plaintiff.

Brodie, for defendant.

HAGER, J.—I shall charge the jury as follows: In this case the doctrine of estoppel would not hold good. It was not akin to a case where the property of a third party was seized on execution by the Sheriff, and he (the third party) stood by and saw the same sold without interfering, and afterwards claimed its return on the ground that it did not belong to the judgment debtor. Instances might occur where the debtor might be absent from home or out of the State, when the Sheriff would levy on execution, take possession of his goods, and by fact of his non-presence leave it out of his power to give such notice as should have been given, as claimed by defendant.

McKinley vs Garrison.

The point urged by defendant's counsel, that the machinery of the kind claimed by the plaintiff could not be retained by him, should be considered by the jury in the light whether it was necessary for the successful carrying on of his business and to enable him to compete with others in his trade, and this same principle was to apply to the other implements which were alleged to be more than he was entitled to for that purpose.

I do not approve of the New York and Massachusetts cases cited, where it was held that a sewing machine was not a necessary implement of trade, and therefore not exempt from execution. In this case I would lay down the law to be, if a sewing machine or other instruments of that species in this age of progress is necessary to carry on a trade successfully, in order to compete without disadvantage, they would be, according to my view, not liable to seizure and forced sale.

In addition, if the jury consider that the number of bellows, anvils, etc., were required to carry on his trade, the provision of the statute on this subject would cover them.

The jury found a verdict for the plaintiff.

McKINLEY vs. GARRISON.

Twelfth Judicial District Court, June, 1857.

CAUSES OF ACTION—ASSIGNMENT.

A plaintiff cannot unite a cause of action for professional services with a cause of action to cancel a promissory note.

The assignment of a chose in action must be averred in a complaint—it cannot be taken for granted.

It appears from the complaint that McKinley sues Garrison for \$1250 balance due for professional services, which were performed by himself and brother, and which claim he avers now belongs to himself as it came to him in the settlement of the partnership affairs of McKinley & McKinley. The complaint also seeks to obtain a decree declaring a certain note given by McKinley to Garrison, for \$500, canceled, inasmuch as McKinley gives Garrison credit for \$500 in

Matthews vs. Kelly.

this suit, which he alleges he received, but gave a note for at Garrison's bank. The defendant demurred to the complaint.

McKinley, for plaintiff.

Crockett & Page, for defendant.

NORTON, J.—I am inclined to hold the demurrer well taken in this cause. The plaintiff cannot join in action a claim for professional service and a right to have a note canceled. The better way was to sue for the whole amount and then the defendant in his answer could have set up the \$500 note and thus bring it before the Court. The causes of action differ too widely to be thus united.

The averment of the assignment is entirely too loose also; the plaintiff says that in the settlement of the partnership affairs it came into his hands, but fails to set out the facts of the assignment. This cannot be permitted. The demurrer is sustained with leave to amend.

MATTHEWS vs. KELLY.

Twelfth Judicial District Court, June, 1857.

EJECTMENT.

A complaint in ejectment, which avers that the plaintiff was seized and possessed of the land in January, and that the defendant ejected him in April, is good. He need not aver continued possession until April,—it will be presumed.

This is an action in ejectment wherein the plaintiff averred in his complaint that he was seized and in possession of the land in January, and that in the month of April following the defendant ousted him. The defendant demurs to the complaint, on the ground that the plaintiff should aver that he was in possession at the time the defendant is alleged to have ousted him.

Burbank, for plaintiff.

Treadwell, for defendant.

NORTON, J.—The complaint in this action is drawn according to the

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form approved by the commission of the New York Legislature, appointed to revise the Code of Practice, and which was composed of eminent jurists. We have the same practice in this state, and I am of opinion that this form of a complaint in ejectment is good as having stood the test of examination by men well versed in the law. It is to be presumed if the defendant ejected the plaintiff subsequent to the time it is alleged he, the plaintiff, was in possession, that he was continuing in possession all the while. Such seems to be the rational view of this form of complaint.

Demurrer overruled with leave to answer.

DEWITT vs. PORTER.

Twelfth Judicial District Court, June, 1857.

ASSUMPSIT.

A complaint which avers indebtedness for money had and received, laid out and expended, &c., is sufficient. The facts need not be set forth.

This is a demurrer to a complaint which contains the common counts in assumpsit for money loaned or advanced. The defendant demurred under the sixth subdivision of section 40 of the Practice Act, and sought to have the complaint aver the facts out of which the cause of action arose.

Waller & Osborne, for plaintiff.

Stanley & Hayes, for defendant.

NORTON, J.—I shall hold the complaint in this action to be sufficient, as it conforms to the decisions of the Supreme Court of this State and New York. The facts need not be set out, the common counts on assumpsit are sufficient.

Demurrer overruled, with leave to answer in the usual time.

Jackson vs. Beers.

JACKSON vs. BEERS.

Twelfth Judicial District Court, June, 1857.

ASSIGNMENT OF A CONTRACT.

An assignee of a contract requiring the continued performance thereof, cannot maintain an action upon the breach of the other party, alleging in his complaint the performance of the conditions by the assignee or agent.

This is an action brought by the plaintiff as assignee of a contract between Gilbert & Stringer and Beers & Davies.

The complaint shows that Beers & Davies entered into a contract with Gilbert & Stringer, whereby Beers & Davies agreed to furnish Gilbert & Stringer 25,000 gallons of turpentine to be distilled into camphene. Gilbert & Stringer agreed to distil the same at the rate of fifteen cents per gallon; and then it was agreed that the nett proceeds, after deducting the market value of the turpentine and the fifteen cents per gallon for distilling, and other expenses of selling the camphene, should be equally divided between G. & S. and B. & D. And it was agreed that for failure to perform on the part of G. & S., they should forfeit their distillery and \$1,000; and for a failure on the part of B. & D., they should forfeit \$3750, or fifteen cents per gallon for the amount agreed to be distilled—and that there should be liquidated damages.

The complaint also averred that the contract was to terminate on the first day of April.

The complaint also avers that during the continuance of the contract, before the 1st of April, Gilbert & Stringer assigned all their right, title and interest in said contract to the plaintiff, and that G. & S. and the plaintiff, *acting as their assignee and agent, fully performed the contract on their part*, and then avers a breach on the part of Beers & Davies, and this action is to recover damages for the breach.

The defendants demurred to the complaint, on the ground that the averment of performance of the contract was by the agent or assignee.

Reynolds, for plaintiff.

Holladay & Cary, for defendant.

Jackson vs. Beers.—Morris vs. Marye.

NORTON, J.—This contract is not assignable during the continuance thereof, but must be performed by Gilbert & Stringer. The averment in the complaint of the performance by an agent or assignee is insufficient. Demurrer sustained with leave to amend.

MORRIS vs. MARYE.

In the Twelfth District Court, June, 1857.

DEFAULT UPON PUBLICATION.

A defendant upon whom personal service has not been obtained, in order to avail himself of the privilege of answering within six months after judgment, must show that he has a meritorious defense.

Where default is entered against a defendant before the time for answering has expired, but judgment is not taken until after the time for answering has expired, the judgment is irregular.

The defendant, Marye, against whom and his co-defendant, Whelan, a decree of foreclosure and sale had been taken, made application to set aside the default against him, and the decree, and to be permitted to answer.

His motion was based upon affidavit showing that on the 14th day of November, 1856, publication of summons to be made for a period of three months against him as an absent defendant was commenced, and was ended on the 14th day of February, A. D. 1857; that on the 25th day of March thereafter, default was entered against him; and that on the 28th day of March, the decree was obtained. The affidavit alleges that default was entered at least one day too soon; but does not show or attempt to show that defendant had any defense whatever.

It was admitted by defendant that a term had expired since entering the decree, without any motion being made, or proceedings had, except the motion referred to.

Bristol & Spencer, for plaintiffs.

Geo. J. Whelan, for defendant Marye.

Morris vs. Marye.—People, Ex Rel. McMillan vs. Visher.

NORTON, J. delivered the verbal opinion of the Court denying the motion. He said that the motion, if based upon the ground that the default was entered prematurely, must be denied, as the Court had lost jurisdiction by the lapse of the term at which the decree was taken. He thought, that taking the default too soon would create irregularity in the judgment.

If the motion was based on the right of the defendant, upon whom personal service had not been obtained, to answer within six months, as provided by sec. 68 of Prac. Act, he held that the affidavit should show that the defendant had a meritorious defense, as the defendant under the section referred to could only be permitted to answer to the merits. He thought that the proper practice in all such cases was to accompany the application with an answer showing a meritorious defense.

PEOPLE, EX REL. McMILLAN vs. VISHER.

Twelfth Judicial District Court, June, 1857.

FORECLOSURE—REDEMPTION.

A decree of foreclosure does not bar the equity of redemption in the mortgagor so as to prevent a creditor of the mortgagor from acquiring a lien upon it at any time before the deed is executed to the purchaser; a judgment creditor may redeem from a sale, under a prior mortgage upon the balance of the judgment due, even after a sale under said judgment has become absolute.

A sale under one judgment does not cut off the lien of a subsequent judgment until a deed is actually executed; under such sale, payment of redemption money under protest does not invalidate the redemption.

No subsequent act by a redemptioner, while the money is in the hands of the Sheriff, before paid over to the purchaser can affect the payment or redemption, although he should attach the money in the hands of the Sheriff. The Sheriff will be required by mandamus to execute the deed.

This is an application to compel the Sheriff of Marin County to execute a deed to the Relator, for the "Punta de Reyes" Ranch, in that County.

The facts as shown by the alternative writ, return and proofs in the case are these :

On the 5th day of December, 1857, Antonio M. Osio who was then

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the owner of the premises, executed a mortgage on the same. This mortgage was afterwards assigned to Thomas G. Cary, Jr., and the premises after that sold to Andrew Randall.

On the 14th of September, 1853, Cary filed his bill in the 7th Judicial District for Marin County, to foreclose this mortgage, and a decree of foreclosure was entered therein on the 4th of December, 1854.

On the 7th day of February, 1855, the relator filed a transcript of a judgment in Marin County, which he had recovered against Andrew Randall.

On the 12th of March, 1855, the interest of Randall in the premises was sold under an execution issued upon a judgment in favor of one Jesse Smith against Randall, and the premises and the purchaser under that sale had taken his deed on the 23d day of February, 1856.

On the 21st day of July, 1855, relator recovered another judgment against Randall, and on the 28th day of July, 1855, a transcript of this judgment was also filed in the office of the Recorder of Marin County.

On the 17th of March, 1856, respondent as Sheriff of Marin County, sold the interest of Randall in the premises under an execution issued upon relator's first judgment, and the relator became the purchaser, and the respondent executed a deed to him, under this sale, on the 26th of December, 1856.

On the 14th of June, 1856, the respondent as Sheriff of Marin County, sold the premises under a plaintiff's order of sale issued upon the decree of foreclosure, entered on the 4th of December, 1854, and Cary became the purchaser for \$16,000, and took a certificate of sale, which certificate together with other documents, were subsequently assigned to John Hyatt.

The respondent then made and filed his report of sale, reporting a deficiency still due upon said decree of \$1727 76; (the mortgage and decree bore interest at 5 per cent. per month.)

On the 13th of December, 1856, the relator with his counsel went to the office of the respondent in Marin County, and gave him notice in writing, that he intended to redeem the premises from the sale under the decree of foreclosure, and also served upon the respondent certified copies of the dockets of his two judgments docketed in

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Marin County, on the 7th day of February, 1855, and 28th of July, 1855, and an affidavit stating that both said judgments were liens upon the premises, and also stating the amount due upon each. Relator then paid to the respondent \$24,146 08, and took a receipt for the same, in which the respondent certified that the premises had been redeemed by the payment of that amount. Immediately after, or accompanying the payment to the Sheriff, the relator protested in writing that the amount paid was too large for the purposes of a redemption, by about \$6,700, and protested against the payment of that amount, and said that the amount was paid for the purpose of procuring the respondent's receipt and certificate that a redemption had been made. At the same time the relator's counsel requested the respondent to deposit the money with Garrison, Morgan, Fretz and Ralston, Bankers in San Francisco, as an arrangement might be made with them to allow interest on the moneys and that it might be to his advantage.

On the 20th of December, (one month after the payment) the respondent came to San Francisco bringing the whole amount of the money with him, and on arriving in the city he deposited \$14,000 of the money with Tallant & Wilde and \$10,000 with Parrott & Co., two banking houses in the city.

On Monday, the 22d of December, the respondent went by appointment to meet Hyatt, the assignee of Cary, at the office of his counsel. And entering the office, respondent was served with a summons and complaint, at the suit of relator, in an action against respondent, in which action relator claimed that the respondent was indebted to him \$10,000 for money had and received to his use. An attachment was issued in this suit for \$6,400 upon the affidavit of the relator, and on the same day the money was attached in both the banking houses in which the same was deposited by direction of the relator.

On the 18th of February, 1857, while the money still remained attached in the banks, the relator filed a bill in Equity in this Court, and obtained an injunction restraining the respondent and his bankers from transferring or negotiating the certificates of deposit of the \$24,000, or the money itself, or any part of it.

After the money had been attached the respondent executed a deed to the assignee of Cary under the foreclosure sale.

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Shafter, Park & Shafter, for plaintiff.

Curry for defendant.

NORTON, J.—Held 1st: That a decree of foreclosure does not bar the equity of redemption in the mortgagor, so as to prevent a creditor of the mortgagor from acquiring a lien upon it at any time before a deed is executed to the purchaser under the mortgage sale.

2d. That a sale under a judgment does not extinguish the lien of the balance of such judgment, for any purpose whatever until the deed of the Sheriff is actually executed under such sale, and that the judgment creditor so selling may redeem from a sale under a prior mortgage, upon the balance of his judgment, even after the sale under the judgment has become absolute by the expiration of six months from the sale.

3d. That the sale under one judgment does not cut off the lien of a subsequent judgment, until a deed is actually executed under such sale. That the expiration of six months after the sale under a judgment, does not cut off subsequent liens upon the premises (in the hands of the same judgment creditor) but that the execution of a deed is necessary for that purpose. The Court also held that the relator might redeem under his second judgment, notwithstanding the sale made under the Jesse Smith judgment and a deed given under it.

4th. That the payment of money under protest in writing, on a redemption does not invalidate the payment or affect the redemption.

5th. That no subsequent act on the part of the relator, while the money is in the hands of the Sheriff, before paying it over to the purchaser, who is entitled to it, and for whom it is paid, can affect the payment or redemption, although he seize and retake the money by attachment in a suit against the Sheriff.

And that, although the money was still attached in the hands of the Sheriff's depositories by the relator, so that it could not be paid over to the purchaser, still a mandamus will issue to require the Sheriff to execute a deed to relator. A peremptory mandamus was therefore allowed.

Newell & Williams vs. El Dorado County.

NEWELL & WILLIAMS vs. EL DORADO COUNTY.

Eleventh Judicial District Court, Jan. 1856.

POWER OF SUPERVISORS—ADDITIONAL COUNSEL.

A Board of Supervisors have no power under the present Statute to contract for the employment of additional counsel to prosecute criminals in the County. It is not such a contract as the law admits. It rests solely with the District Attorney to attend to criminal cases and a contract to pay additional counsel is void for want of authority.

Newell & Williams sued El Dorado County for \$5000 for services rendered at the request of a former Board of Supervisors, in the prosecution of certain parties charged with the crime of murder. They presented their account to the present Board who allowed a thousand dollars of the amount, and refused to allow the residue; whereupon this suit was brought. The defendant demurred on the ground that the Board of Supervisors had no authority to make such a contract as the one declared on, so as to bind the county.

Newell & Williams, in person.

Sanderson & Hewes, for defendant.

HOWELL, J.—In support of the demurrer it is urged that inasmuch as the County is a *quasi* Corporation organized for the purposes of government, and the Board of Supervisors its managing agent, the Supervisors can exercise no other or further powers than those expressly conferred by Statute, and that the Statute confers no power to make this contract.

The Act of 1855, under which the Board was organized and acted, confers the following power: "To control the prosecution and defense of all suits to which the County is a party." (12th Sub. Sec. 8.) "To examine, settle, and allow all accounts legally chargeable against the County;" (2d Sub. Sec. 9,) "and to do and perform all such other acts and things as may be *strictly* necessary to the full discharge of the powers and jurisdiction conferred on the Board." (13th Sub. Sec. 9.)

In the 16th Sec. of the Act is contained the following restriction:

“The Board of Supervisors shall not for any purpose contract debts or liabilities except those fixed by or in pursuance of law.”

The 5th Sec. 11th Article of the Constitution declares that “the Legislature shall have power to provide for the election of a Board of Supervisors in each County, and these Supervisors shall jointly and individually perform such duties as may be prescribed by law.”

If the Board possessed the power to make the contract, it was derived from the foregoing provisions of the Statute and the Constitution. The Board is the creature of the Statute, and has no power or jurisdiction beyond what it confers. This position has not been controverted, nor could it be successfully. It is established by the whole tenor of our judicial decisions, by the general consent and acquiescence of the people, and by numerous decisions in other States upon similar statutes.

Then what power and jurisdiction do these Statutes directly or by necessary implication confer ?

1st. “The Board can control the prosecution and defense of all suits to which the County is a party.”

The plaintiffs contend that the prosecution against Mickey Free and others, in which they rendered their services, is a suit in which the County is a party, within the meaning of this Statute, because in such cases the County may be made liable for costs if the prosecution fails.

This, I must confess, is a new interpretation of its provision and one that I have not before heard given. If prosecutions for murder, grand larceny, &c., in the name of the “People of the State of California,” as they must be by the Constitution, are suits to which the County where they are prosecuted, is a party, and liable to be controlled by the Board of Supervisors, the Court of Sessions, the District Court, and District Attorney in the exercise of the powers conferred upon them in criminal cases, might find themselves in a very awkward and embarrassing position, in consequence of the sudden appearance of some order from the Board controlling matters confided to their care or jurisdiction.

But the truth is, that the Legislature never intended any such thing, as is plainly inferable from the language of the Act itself, and from the whole tenor of our criminal code. Such a power resting in the Board of Supervisors would lead to the most direful conflicts, confusion and discord.

If they possessed a power of this description, certainly, as has been argued for the plaintiffs, they could employ Attorneys to conduct such cases, and the County would be liable for their services. But as they do not, the validity of their contract, if it possesses any, cannot be based upon any authority growing out of this clause of the Statute.

But it is said that, independent of this clause, it is the duty of the County to see to the prosecution of all offenses committed within its limits; that criminals are brought to justice; and that the laws are properly administered and vindicated; and that, in the exercise of this duty, and to the end that it may be properly executed, if it should become necessary to employ counsel, their services would become a county charge to be audited and allowed by the Board of Supervisors.

To a limited extent this is true. As a *quasi* corporation, constituted for the purposes of government, it is the duty of the County to see that the laws are executed and criminals punished; but in the exercise of this duty, it goes no farther and can go no farther, than to furnish the money, officers and agents, necessary to accomplish the object. In the performance of this duty each County is restricted and controlled within certain limits, and those are fixed by Statute. It, too, is created by Statutes, they are its charter and beyond their provisions it cannot go. It possesses no power except such as has been expressly delegated and such as may be necessary to carry into effect the delegated powers.

In looking to the Statutes for the purpose of ascertaining the extent of these powers, and the manner in which they are exercised, we find that Counties, like other corporations, conduct their affairs by means of certain officers, and these have certain duties assigned them, covering the whole field of criminal prosecutions. A Grand Jury is provided for the purpose of enquiring into public affairs and of finding presentments and indictments.

They have an officer to consult and to advise with, and one to execute their commands. They can send for persons and papers, and compel by attachment the attendance of witnesses. A District Attorney is paid a liberal salary to attend to the prosecution of all criminal cases, and he too can subpoena witnesses and compel their attendance. District Courts and Courts of Sessions are provided for the trial of such

cases, with ample jurisdiction and all of the machinery necessary to their complete determination.

The theory of the law is, that these officers and their deputies are able and competent to discharge, to the satisfaction of the public and in such a manner as to meet its demands, all of the various duties that have been imposed upon them. If the Legislature has made a mistake, it is not the fault of the County or of the Board of Supervisors, any more than it would be of an agent who had not been clothed with powers sufficiently ample to attend properly to the interests of his principal. Again, "the Board shall have and exercise the power and jurisdiction heretofore conferred on the Court of Sessions, except in criminal cases," &c. Acts '55 p. 51.

Upon an examination of the Statutes it will be found that the Courts of Sessions exercised, and were clothed with the same power and jurisdiction in County matters, that are now conferred on the Board of Supervisors, and none other—and that they acted under the same limitations and restrictions. This clause then gives no greater power or authority than those already referred to. It serves to show, however, that it was not the intention of the Legislature to give to the Board any criminal power or jurisdiction, by expressly prohibiting it to them. The Courts of Sessions did heretofore and still do, control criminal cases, but this power is forbidden to the Board of Supervisors.

The Board may "examine, settle and allow all accounts legally chargeable to the County."

The law does not give to the Board a *general* supervisory control over the affairs of the County. It can only make orders respecting the property of the County, examine, settle and allow accounts legally chargeable to the County, levy taxes, audit the accounts of officers, lay out and control roads and highways, &c., take care of the sick, divide the County into townships and establish election precincts, control and manage the property of the County, sell certain property at public auction, cause Court houses and jails to be erected, control the prosecution and defense of suits for and against the County, and lastly, do and perform all such other acts and things as may be *strictly* necessary to the full discharge of the powers and jurisdiction conferred on the Board. From these positions it will be seen that in my estimation the Board possess no power to make the contract, and if so it cannot

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settle and allow the plaintiff's account, for the reason that it is not a debt or liability fixed by or contracted in pursuance of law, and is therefore not legally chargeable to the County.

BERNHEIMER vs. KING.—LEHMAIER vs. THE SAME.

Fourth Judicial District Court, June, 1857.

STATUTE OF LIMITATIONS.

The Act of 1852 is retroactive in its operation, and only affects contracts existing at the time of its passage, and the terms of limitation "within one year," and "within six months," commenced to run from the same period.

Contracts which were mature and not outlawed on the passage of the Act of 1855, can be prosecuted within two years after they have matured.

Demurrer to answer. The facts are fully set out in the opinion.

Harmon & Labatt, for plaintiff.

Crockett & Page, for defendant.

HAGER, J.—This action is brought to recover the amount of two promissory notes, made in New York, respectively October 9, 1852, and February 11, 1853, payable at the same place, eight months after the dates thereof.

Defendant, by his answer, sets forth as a defense, that the notes were made and executed out of this State, and the several causes of action arising thereon and mentioned in the complaint, occurred to plaintiff more than two years before the commencement of this action. Plaintiffs demur on the ground of insufficiency of the answer.

This issue involves the consideration and decision of this question: Is the plaintiff's right of action varied or extinguished by the Statutes of Limitation of this State.

On the 4th of May, 1852, an act was passed in effect as follows—An action upon a note executed out of this State can only be commenced as follows:

“First, within one year, where *more than two and less than five years* have elapsed since the cause of action accrued: Second, within six months, when more than five years have elapsed since the cause of action accrued.”

To this, on the second of April, 1855, a supplementary act was passed, providing, in effect, that an action on a note made out of this State, “can only be commenced within two years from the time the cause of action has accrued, or shall accrue.”

The right of action on these notes accrued respectively in June and October 1853, and this action appears to have been commenced on the first of April, 1857.

Recognizing the doctrine to be well established by international as well as the common law, that all actions must be brought within the period prescribed by the local law of the country (*lex fori*) where they are instituted, it becomes necessary to give a construction to the special laws above referred to, and determine to what extent plaintiffs’ remedy in this action is affected by them. Four years not having run at the time of the commencement of the action, the general Statutes of Limitations have no application.

The phraseology of the Act of 1851 is peculiar, and, if we apply its provisions to contracts made after its passage, it is difficult to determine its true intent and meaning; but if, contrary to the ordinary rule, it was intended only to be retrospective, and to have no application to rights of action commencing *in futuro*, it is easily understood.

If it is construed to extend to contracts executed after its passage, it becomes important to determine when the statute commenced to run, and also, if at the time of the commencement of the action—first, more than two and less than five years, or second, more than five years had elapsed since the cause of action accrued?

At the time the action was commenced, more than two years and less than five years had elapsed since the cause of action accrued, though under the provisions of the act the action should have been commenced “within one year.” But from what time? When does the one year commence to run? From the passage of the act, or from the time the cause of action accrued? If from the passage of the act, then the one year expired before the cause of action accrued, and it would be impossible to bring any action within the time speci-

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fied. If from the time the cause of action accrued was intended, then we must hold that if more than two years and less than five had elapsed since the cause of action accrued, the plaintiffs were bound to bring their action in one year after such cause had accrued—a contingency that could not happen in this case. And under the second subdivision, when five years shall have elapsed since the cause of action accrued, it would not be possible to commence their action within the limitation of six months.

The only rational conclusion that I can arrive at, is to hold that the Act of 1852 is, and was intended to be, retroactive in its operation, and only affects contracts existing at the time of its passage, and that the terms of limitation “within one year,” and “within six months,” commenced to run from the same period.

It results from this, that at the time of the making and maturity of those notes, the only statutes affecting plaintiffs’ right of action in this State, were the general Limitation laws, which, as I have before stated, are no bar to the action.

The most that can be claimed under the supplementary act of 1855, is, that on contracts in existence at the time of its passage, the right of action is barred after two years. There is a recognized distinction between the obligation of a contract and the remedy upon it—but if all remedies are wholly extinguished by a new law so that there remains no means of enforcing the contract, it would be difficult to reconcile such a statute with well understood constitutional provisions for the preservation of the obligation of contracts and vested rights.

To extend this supplementary act, operating *in presenti*, to contracts in existence at the time of its passage, the consequence would be an abolition of all remedies, when the right to sue had existed two years before that time.

The demurrer is sustained.

Richards vs. Webster.

RICHARDS vs. WEBSTER.

Twelfth Judicial District Court, June, 1857.

MONEY HAD AND RECEIVED.

An action for money had and received can be maintained against a person who, receiving a check on a Banking house for the use of another, fails to present and collect it in proper time.

This is a motion to set aside the Report of a referee.

Reynolds, for plaintiff.

McCabe, for defendant.

The referee found that one Loring had burned a kiln of bricks upon the premises of defendant, under lease from him.

That Loring executed a chattel mortgage to the plaintiff upon the bricks after they had been burned and while they remained in the kiln.

That Loring left the kiln of bricks in charge of defendant, with instructions to sell the same and pay the money to the plaintiffs, after deducting his commissions.

That afterwards defendant sold a portion of these bricks and took a check in payment for the same, which he still held, without even having presented it for payment. That at the time of receiving the check and for several days afterwards, the drawer thereof had funds in the bank, on which it was drawn, sufficient to pay it.

He also found that after selling the bricks and receiving the check, Loring forbade him to pay the money to the plaintiffs. That plaintiffs had demanded the same.

The referee found and held as conclusions of law, that the direction by Loring to the defendant to sell the bricks and pay the proceeds to the plaintiffs, was coupled with an interest in the plaintiffs and it could not therefore be revoked.

He also held, that an action for money had and received, could be maintained by showing the receipt of a check upon which the money could be obtained by presentation for payment.

NORTON, J. sustained the Referee's report, and ordered judgment accordingly.

Lee vs. Block.

LEE vs. BLOCK.

Fourth Judicial District Court, June, 1857.

GENERAL DENIAL—DEMURRER.

A general denial puts in issue the material and express allegations of the complaint, and is a good plea.

A demurrer to the whole answer must be sustained or overruled; it cannot be sustained in part or overruled in part.

Demurrer to an answer.

Lee & Brewster brought suit against Block and Block upon a judgment obtained in the Circuit Court of Alabama, in this Court on the 1st of April, 1857, as the statute of limitations expired the next day.

The defendant pleaded a general denial, to which was added a plea of the statute of limitations similar to the case made in Bernheimer vs. King p. 106 ante.

To this the plaintiff demurred and the cause was submitted on the brief furnished in the case of Bernheimer vs. King.

Harmon & Labatt, for plaintiff.

Crockett & Page, for defendant.

HAGER, J.—This action is brought to enforce a judgment rendered Oct. 18, 1852, in a Circuit Court of the State of Alabama.

Defendants answer and make defense: 1st, By denying each and every allegation of the complaint; 2d, That the alleged cause of action did not accrue within two years next before the commencement of plaintiff's action.

To this answer plaintiffs demur generally, and allege as ground of demurrer that it does not state facts sufficient to constitute a defense to the action.

By the provisions of section 50 of the Practice Act, plaintiff may demur to the whole answer when it contains new matter, or to one or more of several defenses set up in the answer.

The first defense in the answer is well pleaded and puts in issue the

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material and express allegations of the complaint. (Practice Act, section 46.)

The demurrer being to the whole answer, it must be sustained or overruled as to the whole answer, and therefore upon this issue I cannot proceed to consider the question raised by the 2d defense of the answer and intended to be presented—whether our statutes of limitation are a bar to a recovery in this action. Demurrer overruled.

LYON vs. ROBERTSON.

Twelfth Judicial District Court, June, 1857.

ATTACHMENT BOND—DAMAGES.

Discontinuing a suit brought by attachment, is not a judgment such as will entitle the defendants to recover damages against the sureties.

Counsel who discontinue a cause can deny the discontinuance as a defense to a second action, when in the second action they appear for different parties.

This is an action to recover \$700, amount of an undertaking on attachment. On the 7th of February last, W. P. Thompson commenced in this Court his action against the plaintiffs herein, and procured the issuance of an attachment. The defendants executed an undertaking in the usual form required by law, conditioned that if Lyon & Cannon recovered judgment against Thompson, they would pay to them the amount of the bond. The stock of goods in plaintiffs store was seized by the Sheriff, and at the end of four days released by giving an undertaking for that purpose. Subsequently Thompson served a notice on Lyon & Cannon and on the clerk, of the discontinuance of the action, and an entry was made by his attorneys on the clerk's register to that effect. Plaintiffs to-day offered evidence to show the damage done to their credit, as merchants, by having their stock levied upon, but the Court refused to admit it. Defendants then moved for a nonsuit.

B. S. Brooks, for plaintiff.

Janes, Lake & Boyd, for defendants.

Lyon vs. Robertson.

NORTON, J.—In this case, plaintiff could not recover for damage resulting to their credit as merchants, by reason of issuance of the attachment, nor for the necessary loss of time in releasing it, nor the legal expenses of defending the first suit brought against them. Evidence would be admitted to show the outlay made by plaintiffs in procuring the release of attachment. The motion for a nonsuit would be granted, on the ground that the filing and service of notice and entry on clerk's register were not a judgment of discontinuance—the statute requiring the defendants to obtain judgment before they would be entitled to recover on the undertaking on attachment. The Court held, also, that though the same counsel who now appeared for defendants instituted the action against Lyon & Cannon in the first place, and made the entry of its discontinuance on the clerk's register, and served notice of same on Lyon & Cannon, yet they were at liberty to deny the action had ever been discontinued as a defense to this action on the attachment bond, as they were now appearing for different parties. Judgment of nonsuit.

HASKELL *vs.* CORNISH.

Twelfth Judicial District Court, June, 1857.

PROMISSORY NOTES OF TRUSTEES.

A Promissory Note drawn by Trustees of a Church in their behalf and executed by them, will not create a liability against the Church, but the Trustees who signed it, will be held personally liable.

This is an action on three promissory notes, each being in the words following :

“ San Francisco, April 5th, 1855 : Eight months after date, we, the undersigned, Trustees of the First African Methodist Episcopal Church, in behalf of the whole board of Trustees of said association, promise to pay to Darius Stokes, or order, four hundred and ninety eight dollars and seventy-five cents, with interest at three per cent. per month, until paid, for value received by said association.

HENRY C. CORNISH.

JOHN C. LEWIS.”

Haskell vs. Cornish.

The plaintiff alleges the three notes were subsequently assigned and transferred to him by Stokes.

The answer of defendants alleges they never received any consideration for the notes from Stokes, or from Haskell, and that the debt, if any be due, was by the trustees of the First African Church, being a corporation existing under the laws of California.

It appeared the notes were given to raise funds in aid of the erection of the edifice, and the records of the church were produced to show the Treasurer and Secretary were empowered to sign notes and contract debts in the name of the corporation. It also appeared that Stokes and plaintiff had taken the benefit of the Insolvency law.

There was no evidence, however, introduced to show that plaintiff, when he took the notes, was made aware of their being a church liability, and was aware of any other purport than the face thereof.

Trial by Jury.

G. P. Fobes, for plaintiff.

J. D. Creigh, for defendant.

NORTON, J., In the charge to the Jury, instructed them that these notes, as drawn, could not be enforced against the church property. They were given on behalf of the trustees, without any apparent authority so to raise the money. It seemed a common occurrence for notes of this kind to be made when a few persons get together to start a church, and the authorities vary as to the extent of liability of their makers. It depends altogether on the manner they were worded. If plaintiff purchased the notes in the ordinary course of business, before they became due, and not after, he was entitled to recover against third parties. If the Jury believed they were intended to be, and were executed as the notes of defendants, the plaintiff was also entitled to recover.

Verdict for plaintiff.

Penniman vs. Fiske.

PENNIMAN vs. FISKE.*

Twelfth Judicial District Court, July, 1857.

SLANDER.

The calling of a person "a thief," is actionable, and special damage need not be shown.

Charging a person with being "untrustworthy" authorizes the recovery of special damages, if shown, unless a proper justification is proven.

This was an action to recover \$20,000 for alleged slanderous words spoken by defendant, of and concerning plaintiff. The first count in the complaint sets forth that in March, 1856, plaintiff was in the employment of Bull, Baker & Co., at Shasta, and in consequence of the utterance of the words complained of, and given below, Penniman was discharged from his situation. The slanderous words charged are: "Since he [meaning the plaintiff] has come to this country, he has greatly changed, and will now lie, trifle, and deceive his friends; he [meaning plaintiff] spends his money foolishly, * * * and has been accused of stealing money from a firm he was with here."

The second count charges that the defendant, intending to injure plaintiff in his good name, and to cause said Penniman to be discharged from his employment, did say, speak, and publish of and concerning plaintiff, these words: "Penniman is not trustworthy," thereby meaning and intending, it is alleged, that plaintiff was not deserving of confidence, and that he was a person unfit to be employed by said Bull, Baker & Co.

A third count charges defendant with calling plaintiff "a thief." All these words are alleged to have been spoken and published in the presence of divers persons, in the usual form.

The answer of defendant denies all the allegations of the complaint except the words "Penniman is not trustworthy" were spoken by him, and the truth of this statement is alleged. Defendant denies also that plaintiff suffered any special damage, or that he was discharged by Bull, Baker & Co. by reason of the words complained of being uttered.

* See page 5, ante.

Penniman vs. Fiske.

The evidence went to show that Fiske, the defendant, is one of the firm of Drexel, Sather & Church, Bankers at Sacramento, and that Penniman was a clerk at Bull, Baker & Co.'s from October, 1855, until May, 1856. It appeared that Baker, one of plaintiff's employers, was informed in San Francisco, in April, 1856, about one month after the alleged slanderous words were spoken, of their import, and thereupon wrote to his partner in Shasta to discharge Penniman from their employ, which was done on the receipt of the letter by Mr. Robbins. The person who informed Baker of the character given to Penniman, referred to Fiske as his authority. Baker, after writing to his partner, called upon defendant and inquired what he knew of plaintiff. Fiske informed Baker that Penniman was untrustworthy and could not be relied upon. Plaintiff also introduced a letter written by Baker to Mr. Robbins, his partner at Shasta, informing him that he had received this information concerning the character of Penniman, and directed his discharge from their employ, and to have nothing to do with him or with any house with which he was connected. Mr. Robbins discharged Penniman on receipt of this letter. Robbins' deposition was read for plaintiff to the jury. He testified up to the time of the reception of Baker's letter Penniman had his confidence, and gave satisfaction in the discharge of his duties. Plaintiff, it appeared, subsequently discovered the author of the slanderous charges, and called upon Baker in San Francisco, and attempted to convince him they were unfounded. Baker, it seemed, became satisfied that were not correct, and promised to recommend Penniman as a proper person in case he sought employment, but on subsequent conversation with Fiske, he repeated the assertions, and further that he could prove them to be true. Baker, after this conversation, refused to give the promised letter of recommendation. Plaintiff then commenced this action.

On the part of defendant a number of witnesses were called and examined to prove plaintiff unworthy of trust, and that he was a person of immoral character; that his general reputation was bad, and while in the employ of the Sitka Ice Company he retained \$300 of the money that came into his hands. But it was shown that this amount was due to him for salary, and that he kept it, after consulting and receiving advice of counsel to that effect. Plaintiff was also at one time in the employ of the Pacific Steamship Company.

Banks vs. Banks.

G. F. & W. H. Sharp, for Plaintiff.

Crockett & Page, for Defendant.

NORTON, J., charged the jury: If they believed defendant had called plaintiff "a thief," or charged him with any crime equivalent to it, and it was untrue, plaintiff was entitled to recover without showing special damage. If the defendant charged plaintiff with being untrustworthy, as a clerk, and by reason of it he lost his employment, he was entitled to recover special damages by reason of the loss of employment, unless defendant showed justification, or a proper defense. If the jury believed that defendant had stated that plaintiff was not trustworthy, and the same was true, then defendant is entitled to a verdict. If they believe Penniman was not discharged by reason of the utterance of the alleged slanderous words by Fiske, and has shown no special damages, then plaintiff cannot recover.

The jury failed to agree upon a verdict.

BANKS vs. BANKS.

Twelfth Judicial District Court, June, 1857.

DIVORCE—SEPARATE MAINTENANCE—INJUNCTION.

The Court cannot interfere, by injunction, with the common property, in an action for divorce, where the prayer is for a separation, *a mensa et thoro*, and not *a vinculo matrimonii*.

In such a suit the court cannot appropriate or set apart property for the maintenance of the plaintiff.

The complaint may be allowed to be amended in the prayer, and altered so as to pray for a divorce *a vinculo matrimonii*.

This is a suit to obtain a decree of divorce from the bonds of matrimony existing between Nancy and George S. Banks, and for an injunction restraining the defendant from conveying or in any way encumbering the joint property acquired during coverture. The ground of

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complaint is alleged extreme cruelty, and the facts set forth in the bill certainly show a vast amount of oppression on one side and suffering on the other. The parties were married in August, 1848, at the city of New York, and there has been no issue from the union. The plaintiff alleges that she has a son about seventeen years old, by a former marriage, who is deaf, dumb, and almost blind, and therefore in a measure helpless and a proper object of pity and compassion; but towards this boy, she alleges, her husband has acted cruelly, and has turned him out of doors, by means of which, plaintiff alleges, she has been kept in anguish and unhappiness. Other acts of cruelty towards herself are alleged, which render it impossible, she alleges, for her to live with defendant.

In the complaint it is stated that defendant is owner of a large and valuable building, occupied as a livery stable, built upon leased ground, on Bush street, known as the Rasette Stables, with a dwelling in the second story; that he is the owner of a large number of horses and carriages; that he is also the owner of a dwelling-house on Bush street, worth about \$20,000, all of which is common property, acquired after coverture in this State. That defendant has on various occasions threatened to put this property out of his hands in case plaintiff applied for a divorce, and put the same beyond the reach of the Court, so that plaintiff could not obtain any maintenance from the joint property.

The bill first presented prayed for a divorce from bed and board, and for a separate maintenance. An application was made upon it at Chambers for an injunction. As this may be considered one of the first cases of the kind that has come up before the courts, the ruling of the judge becomes interesting. Before this time all the proceedings instituted were to dissolve the bonds of matrimony, and it will be observed that in divorces from bed and board the court has no power to provide out of the defendant's property for the support of the wife.

B. S. Brooks, for Plaintiff.

Defendant not in Court.

NORTON, J., refused the injunction, and held that plaintiff, on a bill for separate maintenance has no interest in the property itself, but only obtains as a final relief, a decree requiring the defendant to pay a cer-

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tain sum for her support. This decree operates only upon the defendant personally, and does not in any way affect the property. Nor can the Court in such a suit appropriate or set apart any specific property for the support or separate maintenance of the plaintiff. The relation of marriage still continues. No division of the common property is made. The right of the husband to control and dispose of the common property cannot therefore be restrained. It was essential also that the bill should aver that the property was acquired after coverture, and in this State, and specify its value.

The complaint was thereupon, by leave of Court, withdrawn, and amended by altering its prayer so as to ask for a decree of divorce from the bonds of matrimony.

Upon the complaint so amended an injunction was granted, on filing bonds in the sum of \$5,000, to restrain the alienation of the property pending the suit. An order was also made upon the defendant to show cause why an allowance should not be made for alimony and expenses of suit.

TOOMY vs. KNIGHTON.

Fourth Judicial District Court, July, 1857.

JUDGMENT BY DEFAULT.

Under what circumstances a judgment by default will be opened for excusable neglect.

Judgment was entered by default against defendant for money advanced on the 14th inst., for \$1396. Defendant now applies to open the judgment and for leave to defend. It appeared defendant was in the employ of the Pacific Mail Steamship Company, in Oregon, and had come to this city *en route* for New York. Process was served on him about fifteen minutes before the departure of the steamer, on the 20th June last, and while he was on board; and one of the affidavits read sets forth enough of time was not allowed before the steamer sailed to bring ashore his luggage.

It is alleged defendant's arrival in this city was known to plaintiff

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ten days before his arrest, as he had during that time frequented the most public places, and his intention to go to the Atlantic States was well known. The affidavit of defendant's attorney-in-fact alleges that by the arrival of the next steamer from Oregon he expects to receive authentic evidence showing a good and substantial defense to this action. That defendant resides at St. Helens, where all his property, worth thirty thousand dollars, is situated, and that he owns no property in California. Defendant says that he applied to the attorney of the plaintiff for further time to answer, which was granted upon making the preceding representations to him, and he did not believe he would enter the default without notifying him.

The plaintiff states he was entirely ignorant of defendant's presence in the city until two days previous to the commencement of this action, and that being absent from town, he returned only three days before the sailing of the steamer. That on learning defendant was in town, he inquired at the principal hotels, but was unable to learn anything of him. That he was informed at the Pacific Steamship Company's Office that defendant had come down from Oregon, and was stopping with a friend across the Bay, who had taken passage with him for New York. Plaintiff denies the material allegations in defendant's statement. The attorney for plaintiff deposes that he consented to give time to answer until the arrival of the Oregon steamer, but defendant's counsel not having done so, he informed him of his intention to enter up judgment.

C. McC. Delany, for plaintiff.

Satterlee, for defendant.

HAGER, J., held that the neglect in not filing an answer in this case was excusable at law, and under section 68 of the Practice Act he would release the party from the judgment, by opening the default, and allow him to come in and defend; the affidavit on the part of the defendant showed that he had a good and substantial defense, and under the peculiar circumstances of the case he would order the default to be opened, and allow sufficient time for the defendant's counsel to communicate with Oregon, and obtain the facts of the meritorious defense alluded to in the affidavits.

Myers vs. White.

MYERS vs. WHITE.

Sixth Judicial District Court, July, 1857.

NEW TRIAL—ERRONEOUS VERDICT.

The Court has the power to set aside the verdict of a jury, in part, for good cause shown, and order a new trial upon that part alone which has been set aside.

When this is done the verdict will stand good in every other respect, except the part set aside.

The facts are set forth in the opinion.

Clark & Gass, for plaintiff.

McKune, Johnson & Ankeny, for defendant.

MONSON, J., This is an action to recover the possession of personal property. Upon the trial of the case the jury found in favor of plaintiff, and assessed the value of the property at \$199. Plaintiff is dissatisfied with the value of the property as assessed by the jury, and asks that so far the verdict may be opened or set aside, and the question relative to the value of the property be re-tried. In assessing the value of the property the jury wholly disregarded the evidence in the case, and did manifest injustice to the plaintiff. The evidence showed that the property was worth from four or five to twelve or fourteen hundred dollars; the very lowest value fixed by the witnesses was four or five hundred dollars, yet the jury assessed it at \$199, placing the value under two hundred dollars, for the purpose, I presume, of compelling the plaintiff to pay his own costs.

My experience upon the bench has tended, in a very great measure, to impair my respect for jury trials. In too many instances the evidence in the case, and the instructions given by the court, are entirely disregarded by the jurors; when they are sworn, they promise to heed and obey them; but the promise is soon forgotten, and they permit their sympathies and prejudices to govern and control them in making up their verdict. If the plaintiff in this case was entitled to a verdict, (and that he was, the evidence clearly established,) he was also enti-

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tled to have the property justly valued and assessed. This the jury failed to do. The right of plaintiff to the property was fully and fairly tried. Under these circumstances what course should the Court pursue? Set aside the whole verdict and subject the plaintiff to the trouble and expense of trying the whole case again upon its merits, or merely open it so far as to permit the value of the property to be again submitted to a jury?

In the case of *Winn vs. Columbian Insurance Company*, 12 Pickering, p. 287, the Court say: "When there has been a full and fair trial upon the merits, and a verdict to which no valid exception can be shown, we think it would not be consistent with the plain principles of justice to set it wholly aside, and throw the whole open again on account of the mistake or misapprehension of counsel. *There are many so situated that it would be highly proper to grant a new trial as to a particular point*, or for the purpose of correcting a particular error or mistake." *Hutchinson vs. Piper*, 4 Taunt., p. 555. This is analagous to the case of judgments, awards, and other legal proceedings, good in part and bad in part, where the court will, if the position of the cause will admit of it, preserve that which is good and correct that only which is erroneous. Again in the case of *Boyd vs. Brown*, 17 Pickering, p. 453, it was held that where the damages assessed by the jury are excessive, a new trial may be granted in order to determine the amount of damages, without opening the whole case. The Court say: "We think the damages are excessive, but this we do not consider a sufficient reason for setting aside the verdict and granting a new trial so as to open the whole merits of the case to future litigation, which have been once fairly tried, especially as the verdict may be set aside in part, and a new trial granted with respect to the assessment of damages only, and thus the only error existing may be corrected without the expense of a new trial upon the merits."

The ruling of the Supreme Court of Massachusetts in the two cases cited, appears to be approved by Chief Justice Oakley, of the Superior Court of New York. 3 Sandford's Rep., p. 19.

In this case it is ordered that the question relative to the value of the property be re-submitted to a jury, and so far, and no farther, the present verdict is set aside.

State of California vs. Marston.

STATE OF CALIFORNIA vs. MARSTON.

Third Judicial District Court, July, 1857.

OFFICIAL BOND.

An action can be maintained on an official bond, in the name of the State, for the recovery of moneys deficit in the treasury, though they belonged to the school funds, county funds, or other than State funds.

A County Treasurer is responsible for moneys which were stolen from his custody, without any negligence on his part.

This was an action brought on an official bond of Marston, as Treasurer of the County of Alameda, against Marston and his sureties. The breach alleged is that he received, as such Treasurer, \$8,551 86, which he has failed to account for, and which is deficit in the treasury. Of this sum \$1,395 42 belonged to the State Fund; \$1,306 17 belonged to the County Fund; \$419 02 belonged to the School Fund; \$5,431 25 belonged to the County Building Fund.

The defendants demurred to the complaint on the ground that this action could not be maintained in the name of the State, as to the sums of money other than that belonging to the State Fund, and answered, averring as a defense that the defendant, Marston, could not account for the moneys, as they were stolen from his custody as Treasurer, without negligence on his part, and under circumstances he could not prevent.

Blake & Clarke, for Plaintiff.

Pease, Hamilton & Pratt, for Defendant.

HESTER, J., overruled the demurrer as untenable, under the conditions of the bond given to the State for the performance of duties as County Treasurer, and the duties were to safely keep and make proper returns of the State and County moneys. The answer also was no defense, as one of the duties of the Treasurer is carefully to guard against theft, for that is the most ostensible requirement for a custodian of public funds, the presumption being in favor of an officer's honesty. *United States vs. Prescott*, 3 How., 575.

Judgment for the State.

McKenty vs. Gladwin.

McKENTY vs. GLADWIN.

Twelfth Judicial District Court, July, 1857.

PROMISSORY NOTE—INTEREST—FRAUD.

The ante-dating of a Promissory Note is not of itself sufficient to make it void, and is not unlawful, if done for the purpose of carrying out the intention of securing the payee.

Including the interest in a Promissory Note does not destroy its validity.

If any part of a promissory note is added to the amount due the payee for the benefit of the maker, to hinder, delay, or defraud creditors, it will render the whole void and fraudulent.

Action to recover \$25,912 due on a promissory note, dated June 4th, and payable ten days after date, without grace. Defendants failed on the 18th of June, and plaintiff is the first attaching creditor. Their liabilities are \$190,000. Assets, \$80,000, besides stock in store which has realized \$40,000 at auction. Garrison, Morgan, Fretz & Ralston, subsequent attaching creditors, and who have since obtained judgment for \$8,896 against Gladwin, Hugg & Co., intervened for the purpose of setting aside plaintiff's attachment, on the ground of collusion and fraud. They allege unless the debt due them be secured by their attachment, the same will be in imminent danger of being wholly lost, and there is no other property or estate of the said Gladwin, Hugg & Co. on which said attachment can be levied, except that seized by the Sheriff. That if said property seized by the Sheriff be first applied to the satisfaction of the debt due McKenty, the proceeds thereof will be absorbed, and the claims of intervenors and other attaching creditors against defendants will be lost to them. But if the demand of McKenty be adjudged fraudulent and collusive, and therefore void as against intervenors, then the said property and effects, so attached prior to that of intervenors, will be sufficient to satisfy the debts due by defendants to the other attaching creditors. Wherefore the intervenors have a direct interest to prevent the recovery by said McKenty of a judgment in this cause; and for the reason why he is not entitled to recover, they allege and set forth that the promissory note of Gladwin, Hugg & Co., mentioned in McKenty's complaint, is fraudulent and collusive, and was made without any good or valuable

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consideration, and was executed and delivered with intent to defraud, hinder and delay the creditors of said Gladwin, Hugg & Co., which intent was well known to McKenty when he accepted said promissory note. Intervenors further allege that the making of the promissory note and the issuing of attachment thereon was a fraudulent device, arranged between defendants and McKenty for the purpose, and with the intent of defrauding the creditors of defendants.

Gladwin, Hugg & Co. failed on the 18th June, and have since petitioned for the benefit of the Insolvent law.

Upon this trial it was proved by Jackson McKenty, who was examined as a witness by intervenors, that the note was made on the 15th or sixteenth of June last, in anticipation of the failure of Gladwin, Hugg & Co., and for the purpose of securing to McKenty the amount of sales and loans made by him to defendants, and also for his liability upon endorsements of their notes. The note for \$25,912.05 was antedated to the 4th June, and payable ten days after date, without grace, and bore interest at two and a half per cent. per month.

The consideration of this note was as follows :

May 18, 1857.	86 casks of Hams,	\$4218.66
“ 19, “	100 “ “	5082.21
“ “ “	Endorsement of defendants' note, payable	
	June 19,	5000.00
“ 22, “	25 barrels of Flour,	306.25
June 3, “	200 “ “	2400.00
“ 4, “	Endorsement of defendants' note, payable	
	June 19th,	3775.50
“ “ “	Accommodation notes to defendants, due on	
	June 19th,	3879.43
“ 5, “	Loan to defendants,	1050.00
Total,		\$25,912.05

The one hundred casks of hams charged May, 19th were loaned for the purpose of hypothecation for the benefit of Gladwin, Hugg & Co. They were purchased from McKenty about the first of June by defendants. The sale on June 3d, of two hundred barrels of flour, was

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payable in July. Plaintiff admitted the note was given for the purpose of enabling him, in case it should become necessary, to attach the property of defendants as security for the foregoing amount, it being doubtful at the time it was given whether Gladwin, Hugg & Co. would be able to get through their payments. At the time of making the note for \$25,912 05 none of the debts had matured. The debt for the merchandize being payable in July and the notes on June 19th.

Mr. McKenty testified he was a speculator in merchandise; the note was made on the 15th or 16th June; positive it was not made on the 17th; it was made and signed by Mr. Hugg in his office; it is not usual for me to take as large notes as this; there may have been other persons present at the time, but I do not remember; I had no particular reason for dating the note on the fourth; I am not aware Mr. Hugg knew it was ante-dated; I do not think it was mentioned; the motive I had for putting the date on the fourth was that I would receive more interest, and that other notes from Gladwin, Hugg & Co. were made on the same day. Often endorsed for defendants, and Mr. Hugg told me, some time before, if his house ever failed, they would secure me; I had met Mr. Hugg during the day and he promised to come and sign the note; when he came I had the note drawn up in my handwriting; I told him I would pay all the endorsed notes when they fell due. There was no agreement or paper passed between us and no understanding whatever relative to the note more than settling my claims against Gladwin, Hugg & Co.

The examination of McKenty was mainly a close inquiry into his monetary operations for about a fortnight preceding the failure of Gladwin, Hugg & Co., in reference to the notes made by him and accommodation extended to defendants. It appeared that, on the 17th of June, McKenty procured a discount of \$5000 from Drexel, Sather & Church, upon his own note, and it was claimed on the part of the intervenors that the discount was obtained by pledging the note of \$5082 21, given by the defendants, with other notes, as collateral. It was claimed, also, on behalf of intervenors, that there was no proof of the delivery, by McKenty, of 125 barrels of the flour, as testified in his direct examination. The notes of \$5000, \$3957 50, and \$3879 43, were all paid by McKenty at their maturity, and all the

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prior notes which had been held and endorsed by him were given up to defendants before the trial.

Mr. Hugg was called by plaintiff as a witness. He testified that, on the 13th of June, he first conversed with plaintiff about giving the note for \$25,912. It was understood McKenty was to take up all the other notes as they fell due, and the one sued on was given for that purpose. Asked him why it was not made payable on demand; McKenty said it was of no consequence, as all the other indebtedness had been created about the 4th of June. Asked if he was prepared to meet the notes previously given; McKenty said it would be pretty tight work, or something to that effect. There was no talk of attaching and no other paper passed between us. I told him I would call again and let him know what show we had of getting along. Called a second time and told him he had better attach, as we could hold out no longer. First met McKenty on Montgomery street, the 15th of June, and asked him to go with me to Wilson & Alexander's at 12 o'clock. Took a private room, and told him I was afraid we should fail: that I hardly thought we could go through next steamer day; said I was anxious to secure him some way, as he was the best friend I had in the country; offered to give a note for our entire indebtedness in lieu of the others out standing. McKenty expressed surprise, as he had no idea of our failing.

On the foregoing facts, intervenors claimed that the transaction was fraudulent in law, if not in fact, not only because the effect of the giving of \$25,912 was in the nature of an assignment for the benefit of creditors, and therefore void under the insolvent law, but also that it was fraudulent because it was an attempt to sue where the subject matter of suit was not yet due. It was further contended, that the claim of interest of two and a half per cent. per month, was also such a fraud as would vitiate the whole transaction, by reason that it was giving to McKenty a much greater amount than he would otherwise be authorized to collect. The ante-dating of the note was also a badge of fraud, and evidence of collusion between McKenty and defendants.

On the part of plaintiff it was contended that inasmuch as the \$25,912 note was given to be used, in case that Gladwin, Hugg & Co. should not be able to get through their payments, that therefore

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it was not a fraud on the part of McKenty to pledge the \$5082 note on the 17th June. That the transaction was not contrary to the provisions of the insolvent law, and that the preference given by defendants to McKenty being merely for the purpose of securing him, was legal, and that the fact of interest being included in the note did not vitiate the note itself. The Court and Jury were warranted in disregarding the stipulation for interest.

Plaintiff waived all claim for interest and asked a judgment for the principal alone.

S. V. Smith and *McAllister*, for plaintiff.

Shafter, Park & Shafter and *Crockett & Page*, for intervenor.

Defendant did not appear by attorney.

NORTON, J., charged the Jury that if the note for \$25,912 was given in good faith for the purpose of enabling McKenty to secure himself, and without any view of benefit to defendants, or without any intent to hinder or delay the other creditors, then the transaction was a lawful one, and it was not obnoxious to any statute of this State, or the Insolvent law. The ante-dating of the note was not of itself sufficient to make it void, and if it was done for the purpose of carrying out the intention of securing plaintiff, it was not unlawful. Including the interest in the note did not destroy its validity, but it would be good to the extent of the money due thereon for sales and amounts paid by plaintiff upon his endorsements. If any part of the note was added to the amount due plaintiff, and included in it with the intent of benefiting defendants, or hindering, or delaying creditors, it would render the entire note void. The question for the Jury to determine will be if the note made to McKenty was for the object of hindering or delaying creditors, or for the benefit of defendants. If they find it was executed for that purpose, the intervenors are entitled to a verdict. If they find the converse true, then plaintiff is entitled to recover. But in arriving at a conclusion it would be their duty to take into consideration all the facts and circumstances laid before them.

The Jury found in favor of plaintiff.

Wood vs. Hambly.

WOOD vs. HAMBLY.

Twelfth Judicial District Court, July, 1857.

MALICIOUS PROSECUTION—DEFENSE—ADVICE OF COUNSEL.

Plaintiff cannot recover in an action for malicious prosecution where the facts and circumstances would satisfy the mind of any one that an offense had been committed, and the person arrested was the probable offender.

Advice of counsel, fairly obtained and acted upon in good faith, will constitute probable cause, and be a good defense.

If the complainant in the arrest suit be a lawyer, it is a fact for the jury to consider in their deliberations upon the advice of counsel.

This is an action for malicious prosecution, growing out of plaintiff taking from possession of defendant, last February, certain books and papers belonging to the Mountain Lake Water Company. Both plaintiff and defendant claimed then to be the regularly elected President of the corporation, and acting on their belief the plaintiff removed from the office of the Company the books, etc., referred to. It is alleged in the complaint that the defendant, on the 6th of February last, went before the Police Judge and made complaint that the plaintiff had been guilty of the offense of grand larceny, upon which charge he was arrested, and that on the 9th of the same month plaintiff, after examination, was held to answer in bail to the amount of \$2000. It is further alleged that defendant procured certain persons to go before the Grand Jury, which body ignored the bill presented against plaintiff. The complaint concludes by alleging that by reason of said false and malicious complaint and charge, and of said illegal and malicious arrest and imprisonment, he hath suffered greatly in body and mind, and hath been forced and obliged to lay out large sums of money for counsel fees, and otherwise in defending himself against the same, and has suffered loss and hindrance in his business by reason of the premises, and has sustained damages in the sum of \$20,000, for which amount judgment is demanded.

The defendant admits having made complaint, and caused the arrest of plaintiff, but denies he acted maliciously. The defendant also alleges that he had reasonable and probable cause to prosecute plaintiff. The

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answer states that before the 4th day of February defendant was duly elected, and acting as President of the Mountain Lake Water Company, and as such officer had lawfully charge of the books of the Corporation. That plaintiff, without the consent of the defendant, and without any authority therefor, did with force and arms enter the office of the defendant, and without his consent, and against his will, took and carried away the said books, in the affidavit described, forcibly and violently, and refused to return the same on demand. Therefore, defendant alleges, he had just and reasonable cause to make, and did make the affidavit upon which defendant was arrested. The plaintiff, when brought before the Police Judge, of his own accord asked leave to waive the preliminary examination, thereby admitting reasonable and probable cause for the charge, and did thereby himself voluntarily place the said criminal charge in the hands of the Grand Jury, without the procurement or application of the defendant.

The testimony introduced went to show that in the month of December last an election was held for election of President and Directors of Mountain Lake Water Company. Stockholders in attendance voted some for a large number of shares, others by proxy, and many for a few shares. There were two tickets—the name of Col. Wood, the plaintiff, being at the head of one for President, and Gen. Hambly, the defendant, on the second.

A large number of shares offered to be voted upon were rejected on the ground that the stock was improperly issued. Gen. Hambly was declared elected, but plaintiff denied the legality of the proceeding by reason of throwing out the votes on this stock, which he contends were genuine, and which would have been cast in his favor and secured his return to the office of President by a very large majority. Proceedings were afterwards instituted in the Fourth District Court to restrain Hambly from performing the functions of President, and to establish the right of Wood to enter upon the discharge of the duties of the office. Since then the suit has been discontinued, and Col. Wood resigned the position of President. A considerable portion of the stockholders who recognized plaintiff as President, opened an office and proceeded with the business of the Company. Operations were commenced near the Lake, and they are now in progress. Some time ago Gen. Hambly assumed the responsibilities of President. To push the

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work through he entered into correspondence with London capitalists for the purpose of forwarding the construction of the reservoirs and laying down pipes, but plaintiff insists, for the purpose of benefiting himself at the expense of all other stockholders.

All these facts came out on the trial, for it seemed a part of the defense to show that Gen. Hambly had probable cause to complain of plaintiff, for removing the books in his custody while thus performing the duties of President, and that he (Hambly) had sufficient grounds to believe he was rightfully and legally elected to the office.

It appeared from the evidence that, at a meeting of the Directors of the Company, plaintiff and two others were instructed to procure the books of the Corporation, in defendant's possession, and take them to a new office. Wood proceeded to the office of the defendant, and having asked for a particular book to examine, when he got it removed it in presence of Hambly. The other books and papers were taken in defendant's absence, and it is alleged in the night time. The removal of the books was made by advice of eminent counsel. The entire affairs of the Mountain Lake Water Company, and the nature of the difficulties that have arisen recently, were gone into and laid before the jury.

Defendant introduced evidence to show the character of the proceedings had when he was elected. That the meeting was attended by the principal stockholders, and a majority of those entitled to vote cast them in his favor, and that the stock rejected was issued contrary to law. However, it seemed Mr. Hambly's votes represented only six or seven hundred shares, and at least seven thousand were rejected. It appeared that Mr. Wood has been connected with the company from its inception, and it was made also to appear that defendant's interest did not exceed being the owner of two shares. It was also proved that Mr. Hambly had consulted counsel before applying for a warrant, and that it was on advice first obtained in this manner he caused plaintiff's arrest.

The defense was that probable and reasonable cause existed for instituting criminal proceedings against plaintiff; and that Mr. Hambly, before commencing the prosecution, consulted with Col. James, on whose advice, after putting him in possession of the facts concerning the removal of the books of the Mountain Lake Water Company, by

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Colonel Wood, he presented the charge of grand larceny against the plaintiff. On the part of plaintiff it was advanced that this consultation with another lawyer was in anticipation of the action now brought for malicious prosecution. Plaintiff also relied on the facts adduced by the testimony to negative the defense of probable cause.

Cook & Fenner, for plaintiff.

Wm. Duer, for defendant.

NORTON, J., charged the jury substantially as follows :

If the facts and circumstances in and of themselves would satisfy the mind of any one that an offense had been committed, and they pointed towards a particular person as the offender, and in this case the defendant had Mr. Wood arrested under such circumstances, it would constitute probable cause, and plaintiff could not recover. Much testimony had been introduced remote in character, but conceded on both sides to have some bearing on the issue, and so let in for their consideration. The jury would consider all this evidence to know if Mr. Wood intended to steal the books, and if Mr. Hambly has failed to satisfy them that he believed Mr. Wood had such purpose, he cannot sustain his defense on that point. In another branch of the case it is contended that defendant, honestly and *bona fide* sought the advice of counsel before calling upon the officers of justice to punish the offender against his rights, as plaintiff, it is said, was believed to be ; and having honestly and fairly made application to Col. James, a person competent to give advice, his action, upon such counsel, constitutes a defense. This question appears not to be settled in Great Britain. In this country the Court would charge the law to be that advice fairly obtained from counsel and acted upon in good faith by a complaining party, constituted probable cause. The jury, however, would have to look to the evidence and surrounding facts to determine the good faith of the defendant in seeking the advice of other counsel before procuring the arrest of plaintiff. If Mr. Hambly concluded to institute a criminal prosecution against the plaintiff, and then called in another lawyer to assist in the proceeding before its commencement, and he approved of the grounds of complaint, it would not be that kind

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of probable cause to make up a defense. It is said Mr. Hambly is a lawyer ; but the fact is insufficient to show it was not his duty to look elsewhere for advice. It may be that acquainted only with the civil practice, and not relying on his own knowledge, he looked for advice from one skilled in the criminal law, and therefore the fact of plaintiff being a lawyer would not take from him the protection of this defense. But the fact of plaintiff being a lawyer, nevertheless, may be taken into consideration ; and whether his application to Col. James was fair and honest was also a matter the jury should not disregard.

The jury found a verdict in favor of plaintiff.

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Fourth Judicial District Court, July, 1857.

COMMON LAW IN CHINA—COPARTNERSHIP—ASSIGNMENT.

This State, in point of sovereignty and jurisdiction, has the same dominion over personal that it has over real property actually situated within its territory ; it may by law regulate its transfer, subject it to process and execution, and control its disposition to the same extent it may exert in its authority over real estate ; but this should not be done in violation of the rules of law as fixed by comity.

In the absence of all proof that an assignment was made by compulsion of law, or under bankrupt or insolvent laws, it must be regarded as a voluntary assignment.

Where, under an assignment in a foreign country, property passes to the possession of the assignees, though the assignment is not recognized by the California law, yet it is sufficient to pass the property, and the assignees are entitled to be protected in their possession.

The Common Law is the particular law applicable by treaty to Americans residing in China, and not the general law prevailing in the Chinese Empire for the government of an unenlightened people.

In copartnership each partner ordinarily, in the absence of fraud on the part of the purchaser, has the *jus disponendi* of the whole partnership property.

Where a partner is absent, so that he cannot be consulted, an assignment by a copartner, of the partnership property, in trust for creditors, without preferences, if made in good faith, for sufficient cause, and for the benefit of the firm, is valid and should be sustained.

In an assignment it is sufficient if the debtor unconditionally and unreservedly transfers the whole of his property to assignees for the benefit of all his creditors.

The omission to annex the usual schedule is not sufficient to avoid an assignment.

It is settled in the United States that assignments directly to creditors are not valid without their assent; but if made to trustees for their benefit it does not require their assent.

In determining the validity of an assignment the question is, not whether fraud may be committed by the parties to it, but whether the instrument is fraudulent in its operation.

The following are the facts of the case as agreed upon by stipulation, the other facts referred to in the opinion arose from depositions taken, or other evidence.

1. That the plaintiffs in this action compose the firm of Russell & Co., and James Purdon & Co., of Canton, named in the assignment of Nye Brothers & Co., hereinafter referred to.

2. That the firm of Nye Brothers & Co., referred to in the assignment, was composed of Gideon Nye, Junior, and two or more other persons.

3. That Messrs. Nye Brothers & Co., a mercantile firm composed of citizens of the United States, residents of and doing business in Canton, in China, shortly before the eleventh day of March, 1856, failed and became and on that day were insolvent. That on the said eleventh day of March, Gideon Nye, Junior, one of the said firm of Nye Brothers & Co., the only resident partner, and managing the affairs of the house at Canton, appeared before Oliver H. Perry, United States Consul at Canton, and signed and acknowledged before the said Consul an instrument in writing, which, with the acknowledgment thereof, is in the words following:

"Be it known that on the eleventh day of March, A. D. eighteen hundred and fifty-six, before me, Oliver H. Perry, Consul of the United States of America, at Canton, China, personally came and appeared Gideon Nye, Jr., a citizen of the United States of America, and at present a resident of the city of Canton, China, and a partner in the commercial house of Messrs. Nye Brothers & Company, residing, transacting, and doing business in the city of Canton, China, he being the only partner in the said commercial house of Nye Brothers & Company here present, and requested me to note that he desires to assign and hereby does assign, all and singular his real and personal property, as well as all and singular the real and personal property belonging and appertaining unto the said commercial house of Nye Brothers & Co.,

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whether situate in China or elsewhere, jointly unto Messrs. Russell & Company, a commercial house residing and doing business in Canton, China, and unto James Purdon & Company, also a commercial house residing and doing business in the said City of Canton, China, in trust and for the benefit of each and all the creditors of the said Gideon Nye, Jr., and the said commercial house of Nye Brothers & Company, and the said appearer declared that he reserves to himself sufficient time to record in this Consulate a full and complete schedule of all the assets and liabilities, whether appertaining and belonging to him personally, or appertaining and belonging to the said commercial house of Nye Brothers & Company, of which he is a partner as aforesaid.

GIDEON NYE, JR.,

For self and for

NYE BROTHERS & CO.

Noted before me on the eleventh day of March, A. D. eighteen hundred and fifty-six, at the hour of two P. M., this day; in faith whereof I hereunto sign my name, and affix my seal of office.

OLIVER H. PERRY,
U. S. Consul.

{ L. S. }

That at the time of executing said instrument the said firm of Nye Brothers & Company was largely indebted to citizens and residents of China, and to citizens and residents of the United States, and to citizens and residents of Great Britain, and also to citizens of Great Britain and the United States residing at Canton.

4. That the merchandise in controversy was shipped by Nye Brothers & Co., from Canton, to Morgan, Hathaway & Co., at San Francisco, in the ship called the "Barreda Brothers," before their failure, in March, 1855, and that the "Barreda Brothers" returned to Canton, after the failure, from stress of weather, when the plaintiffs took actual possession of the goods, as assignees, under the before recited assignment of Nye Brothers & Co., and shipped them directly to Morgan, Hathaway & Co., for sale, with instructions to account to them, as such assignees, for the proceeds; and that the seizure of the goods was made while in the possession of Morgan, Hathaway & Co., under the consignment of the assignees.

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5. That after the execution of the said assignment, a controversy arose between one A. B., a citizen of the United States residing at Canton, and the before mentioned Russell & Co. and James Purdon & Co., assignees as before mentioned, which became and was pending before the said Oliver H. Perry, United States Consul at Canton, and in which was involved the question, whether or not the said assignment was good and valid; and in said proceeding the said Oliver H. Perry rendered a decision in the words following:

"After a true and careful consideration of the case, the Court decides, that the assignment made by Gideon Nye, Jr., on the 11th of March last, of all and singular his real and personal property, as well as all and singular the real and personal property belonging and appertaining unto the commercial house of Nye Brothers & Co., unto Messrs. Russell & Co. and James Purdon & Co., in trust for the benefit of each and all the creditors of the said Gideon Nye, Jr.; and the said commercial house of Nye Brothers & Co. has received the assent and adoption of his, the said Gideon Nye, Jr.'s, copartners; and that an assignment made after insolvency, which divides the assets with perfect equality among all the creditors, is considered by the Court, under its equity jurisdiction, as a valid trust, and will be sustained.

"It is, therefore, decreed that all proceedings in this case be stayed without day.

"The costs in this case to be paid, one-half by the plaintiff and one-half by the intervenors."

OLIVER H. PERRY,
U. S. Consul.

L. A. HITCHCOCK,
O. E. ROBERTS.

6. That the assignees have, by general and special circulars, notified the creditors and others dealing with the house of Nye Brothers & Co., of the state of the assets and liabilities; and that their business as assignees in the execution of their trust, is still unsettled.

7. That the the defendant, as Sheriff of San Francisco county, seized the goods in controversy, by a valid execution issued upon a valid judgment in favor of F. Huth & Co. vs. Nye Brothers & Co., and that said defendant knew at the time of such seizure that said

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goods were claimed by the plaintiffs, as assignees of the defendants in the execution.

8. That the value of the said goods is fifty thousand dollars.

Halleck, Peachy & Billings, and *G. Yale*, for plaintiff.

Julius K. Rose and *W. Duer & D. Lake*, for defendant.

HAGER, J.—The parties, by stipulation in writing, have agreed upon and admitted the principal facts, and I shall therefore not refer to them except so far as it may be necessary to explain my conclusion upon some of the points raised upon the argument.

Upon the 11th day of March, 1855, the mercantile house of Nye Brothers & Co., doing business at Canton, China, became insolvent, and Gideon Nye, Jr., the only member of the firm then in Canton, for himself and his firm, before the U. S. Consul at that place, made and executed a written assignment of his personal, and also the partnership property, to the plaintiffs, residents of the same place, “in trust and for the benefit of all the creditors of said Gideon Nye, Jr., and the said commercial house of Nye Brothers & Co.”

The assignees accepted the trust, entered upon the duties of their office, and with the acquiescence and co-operation of the creditors residing in China, took the possession and control of the insolvents property, and proceeded to convert it into money.

This action is brought by plaintiffs, as assignees, against the defendant, Sheriff of this County, to recover the value (admitted to be \$50,000) of a quantity of teas belonging to the insolvent's estate, shipped and consigned by plaintiffs to a mercantile house in San Francisco, for sale, and there seized by defendant under an execution issued upon a judgment for \$200,000, obtained by Frederick Huth & Co., of London, Great Britain, before the arrival of the goods in this State.

The principal question to be determined is whether the assignment made at Canton, by the one partner, Gideon Nye, Jr., is valid and binding upon the firm of Nye Brothers & Co., and sufficient to vest the property in question in the assignees, as against the judgment creditors named, and prevent its being seized by them upon execution.

In considering the question it is necessary in the first place to deter-

mine the law that is applicable to and should govern in testing the validity of the assignment, and of the rights of property.

1. It was urged upon the argument that the property being now within the territory of this State, the validity of plaintiffs' title, and the assignment, must be tested by the *lex fori*.

For many purposes personal property is deemed to have no *situs* except that of the domicile of the owner, yet this being but a legal fiction it yields whenever it is necessary, for the purposes of justice, that the actual *situs* should be inquired into. At the time of the assignment the property belonged to Nye Brothers & Co., and was then upon the high seas; owing to stress of weather the ship put back to Canton, where the property was taken possession of by plaintiffs, under the assignment, and by them forwarded to this port.

This State, in point of sovereignty and jurisdiction, has the same dominion over personal that it has over real property actually situated within its territory; it may by law regulate its transfer, subject it to process and execution, and control its disposition to the same extent it may exert in its authority over real estate; but this should not be done in violation of the rules of law as fixed by comity.

According to the authorities in the United States there is a recognized distinction between assignments *in invitum*, or under the bankrupt laws, and voluntary assignments made by the owner of property while residing in a foreign country; in the one case the transfer is by the operation of the law of the foreign country, in the other it is by the act of the party. In the absence of all proof that this assignment was made by compulsion of law, or under bankrupt or insolvent laws, it must be regarded as a *voluntary assignment*. Such assignment, if made according to the law of the domicile, will generally pass personal property, whatever may be its locality, abroad as well as at home. Story C. L., §410-411.

Now in this State, by our insolvent laws, as construed by the Supreme Court, all voluntary assignments by insolvent debtors for the benefit of creditors, are declared void. If, therefore, at the time of the assignment, this State had been the *situs* of the property, or if there had been no delivery in China to the assignees, and the property had arrived here as the property of the insolvents, the *lex loci rei sitæ* would have prevailed over the law of the domicile, and the questions

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involved herein would have been determined by the laws of this State. But the assignment, and the delivery of the property under it, having been made and completed in China, and our statute law having no extra-territorial force, the assignees, if the assignment is in other respects valid and sufficient to pass the property, became *lege loci* the legal owners, and entitled to be protected in their possession of the property. *United States vs. U. S. Bank*, 8 Rob. (La.) R., 262.

2. At the time of the failure and assignment Gideon Nye, Jr., resided, and the place of business of their house was at the "*Factories*," as it is called—an inclosed place, isolated and consisting of a few acres—outside of the walls of Canton, where the foreigners had their habitations, and were only permitted to reside and do business at that port. By the treaty of July 3d, 1844 (see treaty, U. S. Statutes at Large, 592) between the United States and China, five ports, of which Kwang Chow (Canton) is one, were opened to American commerce, and our government is authorized to appoint Consuls, and our citizens are permitted to reside there.

This treaty also provides for the examination and decision of controversies between citizens of the United States and subjects of China. Also that all questions with regard to rights of property or person, between citizens of the United States, shall be subject to the jurisdiction and regulated by the authorities of the government of the United States. And that controversies between the citizens of the United States, and the subject of any other government, shall be regulated by the United States and those governments, without any interference on the part of China.

By the Act of Congress of August 11th, 1846, (9 Stat. at Large, 276,) the Commissioner and Consuls of the United States, appointed to reside in China, are vested with judicial authority in civil and criminal cases; the laws of the United States are extended over citizens of the United States in China, and where they are deficient the *common law* is extended in like manner; and where they are both deficient the Commissioner shall, by decrees and regulations, which shall have the force and effect of law, supply such defects and deficiencies.

By the testimony it seems neither Europeans nor Americans resort to the Chinese Courts for the adjudication of questions involving rights of property, or for any other purpose, but each in such cases apply for relief, and transact legal business before their respective consuls.

What the prevailing Chinese law is does not appear, nor do I think it material, for if the provisions of the treaty are observed the laws of that country cannot prevail, and their tribunals, even if competent, have not the power to give relief when a controversy occurs between citizens of the United States and the subjects of any other government, although there may be no regulations by treaty on the subject between the respective governments.

The members of the firm of Nye Brothers & Co. and the plaintiffs are American citizens, and as such, under the treaty, and the subsequent legislation of Congress, are entitled to the protection of that system of jurisprudence known in this country and England as the *common law*. This same law prevails here and is the rule of decision in this State.

According to the principles of the common law the effect and validity of the instrument of assignment must be tested by the *lex loci* of the assignment; that is, the particular law applicable to Americans residing in China, and not the general law prevailing in the Chinese Empire for the government of an unenlightened people, unused to the customs and civilization of Christian nations. Even if we should hold that the general Chinese law must control, in the absence of all proof of what it is, by the law of this State the common law would be regarded as the *lex loci* of the assignment.

Adopting the principles of the common law for our guide, I will proceed to notice and consider some of the objections made against the validity and form of the assignment.

I. *One member of a partnership firm cannot alone make a valid assignment of the whole partnership effects for the benefit of creditors.*

In the absence of bankrupt laws prohibiting it, debtors have an absolute legal right, in good faith, to make a general assignment of their property in trust for the benefit of their creditors; this power rests, as an incident to the right of property itself, on the same foundation with that to acquire and enjoy.

In cases of copartnership, each partner being the authorised agent of the firm, in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole partnership property. But in regard to the power of one partner to make an assignment of the partnership effects for the benefit of creditors,

there is some conflict in the authorities, and the law, in some respects, is not conclusively settled.

The principles deducible, as settled by the weight of authority, appear to be these :

1. That one partner may assign a portion or the whole of the partnership effects *directly* to creditors, in payment of partnership debts.

2. That an assignment made by one partner in the name of the firm, and with the consent of his copartners, is of the same effect as if made by all.

3. That one partner cannot make a general assignment *to trustees* for the benefit of creditors, against the consent or without the concurrence of his copartners, the latter being present and capable of acting in the matter.

The numerous authorities upon these points may be found referred to and collated in Burrill on Assignments, pp. 18, note (4), 86-89 ; 3 Kent's Com. (7th ed.), 44, and notes (a) and (1) ; Collyer on Part., §395 and notes.

I have not met with a case where it has been decided for or against the precise proposition—whether or no at common law one partner can make a general assignment of the partnership property, to trustees, for the benefit of creditors, without giving preferences, when his copartner is absent and cannot be consulted. The cases bearing most directly upon the question have mostly grown out of controversies between partners themselves—for instance where one not joining in the assignment brings suit to set it aside—and the decisions have been based on the ground that such assignments work a dissolution of the partnership ; are out of the course of trade ; not within the implied powers incident to the partnership relation ; and are in fraud of the rights of the other partners. In some instances, too, the decisions have been influenced or controlled by local insolvent laws or statutes regulating these assignments.

After reviewing all the authorities, a general conclusion, which appears to me to be reasonable, has been announced as inferable from the decisions pertinent and analogous in principle, to this effect : that where a partner is absent, so that he cannot be consulted, an assignment by the copartner of the partnership property, in trust for creditors, without preferences, if made in good faith, for sufficient cause and

for the benefit of the firm, is valid and should be sustained. Burrill, 56-57 ; 1 Amer. L. Cases, 444.

To these principles of law let us apply the facts.

It is alleged that the firm of Nye Brothers & Co. consisted of Gideon Nye, Jr., Clement D. Nye, and Charles K. Tuckerman. By the proofs it is shown that Clement D. Nye, at the time of the failure, was residing and doing business at Shanghae, about nine hundred miles from Canton, and that it required from ten to fifteen days to make a trip and return between the two places. Tuckerman was a salaried partner, not sharing in the profits and losses, and at the time of the assignment was absent from China, on a trip to Calcutta. Subsequent to the assignment Clement D. Nye denied that he was a partner at the time of the failure, asserting at the same time that he had withdrawn from the house in August previous thereto. By the proceedings had before the United States Consul, as contained in the stipulation, it seems he held that the assignment received the assent and adoption of the copartners.

The immediate cause of the assignment was the arrival of the European mail, with the return of protested bills drawn by the firm upon London. It does not appear that either of the alleged partners have made objection or dissented to the assignment, but on the contrary, from the facts disclosed, the presumption is the assignment was fairly made and acquiesced in by them ; that it is beneficial to the interests of the copartnership, and the absent partner must be considered as having vested in Gideon Nye, Jr., implied authority to act in all matters for the benefit of the firm.

II. *Another objection is, the assignment is defective in form.*

In assignments of this character the law requires no particular form to be observed. They may be by the debtor to the assignees in the form of a *deed poll*, without making the latter a party ; or *bipartite*, between the debtor and assignee, the latter executing it as a formal party ; or *tripartite*, between the assignor, assignee, and creditors, all executing it as formal parties.

It is sufficient if the creditor unconditionally and unreservedly transfers the whole of his property to one or more assignees for the benefit of all his creditors. By such an assignment a trust is created both at law and in equity, for all the creditors, rateably, and a court would en-

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force and sustain it for their benefit. This assignment is substantially in conformity with the requirements of law. It is an absolute transfer of the whole property, without reservation, to the assignees in trust for the benefit of each and all the creditors. The assignees received the assignment upon this express condition, and having accepted it, and entered upon the performance of their duties, by intendment and operation of law there is an implied trust which they are as much bound faithfully to execute as if they had expressly covenanted to do so. They might have declined to act, but not doing so, by merely accepting the assignment without executing it, they become the trustees of the creditors, and a court, upon application, would compel the faithful execution of the trust for their benefit. This rule of law is not altered although the assignees are named as Messrs. Russel & Co., and James Purdon & Co., but is applicable to all or any of the parties named who have accepted. Neither is it necessary to the validity of the instrument that it should contain an express power to sell; this is necessarily implied by every conveyance for the payment of debts. Burrill, 228-229, 263, 281, 451; 2 Story's Eq. J., §1045, and authorities cited.

Neither is the omission to annex the usual schedules sufficient to avoid the assignment. If it contains a provision, as is the fact here, that schedules are to be made out, (which by the proof appears to have been done in this case,) any inference of fraud from this circumstance is repelled. Such a provision is not a condition precedent to the operation of the assignment. Burrill, 255.

Nor do I think it a material or valid objection that the assignment is made for the benefit of the creditors of the assignor, and those of Nye Brothers & Co. The instrument itself creates no priorities, gives no preferences; nor are the different classes of creditors by express terms placed upon an equality, or entitled to *pro rata* payments; the assignment does not specify how or to whom the payments shall be made, but simply declares it is for the benefit of "*each and all*." The payment of the private and firm creditors must therefore be made according to the ordinary rules of law applicable thereto, as established by the law of partnerships; or as a court of competent jurisdiction may direct.

In this connection it may be remarked, by the stipulation it appears the validity of this assignment has been sustained by a judicial decision

of the U. S. Consul, at Canton, which, if not conclusive, should at least be received as some evidence of the *lex loci* of the assignment.

III. A further objection is, *the assignment has not been assented to or executed by all the assignees or by the creditors.*

In addition to what has been said it may be stated it appears that the assignees are proper and suitable persons for the position; that some of them have accepted, and it is not in proof that any have declined to act. Acceptance is presumed until the contrary is shown, even where the trustee is absent; and an acceptance by one or more of several assignees, where two or more are appointed, is operative as to the assenting trustee, unless the instrument of assignment contain a condition to the contrary. Burrill, 281-282; 2 Rt., 533 and note (b).

In this country it is authoritatively settled by the Supreme Court of the United States, as well as by most of the State Courts, that assignments *directly to creditors* are not valid without their consent, but if made *to trustees* for their benefit, it does not require their assent, or that they shall be formal parties, to render them valid and operative, unless the assignment is drawn with reference to the creditors becoming parties, or is made upon the express condition that they or a portion of them shall sanction it. If they are made in good faith by the debtor, and assented to by the assignee, the assent of the creditors will be presumed, and it will be deemed a valid conveyance, founded upon a valuable consideration, and good against creditors proceeding adversely by attachment, or seizure upon execution, of the property conveyed thereby, unless all the creditors for whose benefit the assignment is made repudiate it. 2 Story's Eq. J., §1036, a, and note (3); 2 Kt., 533, and notes (a) and (b); Burrill, 84, 307-316, and cases referred to.

In England the same rule has not been so uniformly adopted, and in some of the cases it has been held that the *assent* or *privity* of creditors to an assignment is essential to render it operative in their behalf. By reason of their bankrupt and insolvent laws these kinds of voluntary assignments have been discouraged by the Courts of that country, and how far the adverse decisions may have been influenced by their local laws and the use of the tripartite instrument of assignment, which it seems is there most commonly used, I have not sufficiently examined; but I feel unwilling to depart from the course of American adjudications, and adopt a rule which I consider less sound in principle.

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The creditors in China, according to the proof, representing about two-thirds of the whole indebtedness of the firm, held several meetings with the assignees ; took measures to carry out the assignment ; assisted and gave instructions to the assignees about the property. This would be sufficient *assent* and *privity* on the part of the creditors resident in China, within the American or English rule, especially as a verbal assent is sufficient. Burrill, 317.

IV. The last objection that I shall notice is : *That the assignment is fraudulent and void.*

Excepting the absence of schedules, which has heretofore been referred to, there are none of the usual *indicia* of fraud appearing upon the face of the assignment itself. It is general in its terms and contains no unusual provisions or clauses, or any reservations in behalf of the assignors. Those of an extrinsic character referred to in the argument, and relied upon as sufficient to invalidate the assignment are as follows :

1. That the assignees have mismanaged the property, allowed the assignor to retain the possession of a portion, and to assist them in the performance of their duties as to the residue.

It is in evidence that at a meeting of the creditors at Canton, it was decided that the assignees should allow the wife of Gideon Nye, Jr., \$2,000 worth of furniture belonging to his estate ; and also that the assignees employed Nye himself to assist them in the estate, at the rate of one hundred dollars per month.

In determining whether or no an assignment is fraudulent as against creditors, the question is not whether fraud *may be committed* by the parties to it, but whether the instrument itself is fraudulent in its operation. Subsequent events do not generally affect the character of the assignment. If it is valid in its creation, it is not invalidated by subsequent fraudulent or illegal acts of the parties. If the assignees, without sufficient authority, suffer the property to become lost to the estate, or diminished in value, they are not discharged from liability. If the estate sustains a loss on account of their shipping a portion of the goods to this market for sale, (not a reasonable probability,) they may render themselves personally liable for the deficiency ; but their acts alone, if illegal or fraudulent, cannot vitiate the assignment. Even if Gideon Nye, Jr., had withheld the furniture without any consent of

the assignees or creditors, the validity of the assignment would not have been impaired. Burrill, 304, 400-401.

Nor can the fact that the assignees employed the assignor as their agent or clerk, and as such he was in the possession of the property, be regarded as evidence of an original fraudulent intent. This, from want of necessary information, many times becomes essential to a proper execution of the trust, and the assignee is held responsible for his acts the same as any other agent or employee engaged about the business. Burrill, 303, 429-430.

2. That the assignment being void in part, because it conveys real and personal property, and is not under seal, is therefore void as a whole.

There are many exceptions to the rule that an assignment cannot be void in part without being void *in toto*; and one of these is that it may be valid as to the personal property and void as to the real. Rodgers vs. Forrest, 7 Paige's Ch. R., 272; Burrill, 401-406.

This in controversy is personal property, and the instrument of assignment, as a simple contract, is sufficiently well executed to transfer the title to that kind of property.

There is no evidence that the assignors owned or possessed any real estate, and it is unnecessary to consider the validity of the assignment to convey that kind of property.

I have not noted all the cases from which my conclusions have chiefly been derived, but by consulting the text books as I have indicated, reference can be had to those not cited.

The validity of the assignment, and plaintiffs' title to the property at the time of the seizure, is sustained.

Judgment should be awarded in their favor for the value of the property, and a finding may be drawn accordingly.

Waltham vs. Waltham.

WALTHAM vs. WALTHAM.

Sixth Judicial District Court, July, 1857.

PARENT AND CHILD—CUSTODY OF CHILDREN.

The general rule is that the father is entitled to the custody of the children, because it is supposed he is better capable of educating and supporting them.

Next to the right of the father that of the mother must be recognized.

If the husband is insolvent, and unable to provide for the maintenance of the children, and the mother is possessed of property, and with the children in her custody, is properly supporting and educating them, the Court will not interfere with that custody while an action for divorce is pending between the parties.

The Court will take into consideration the abandonment of the family by the father, and the probable desire to annoy and harrass the mother by this application, because she has applied for the divorce on the ground of desertion.

The facts are fully set forth in the opinion.

Crocker & Robinson, for plaintiff.

Winans & Hyer, for defendant.

MONSON, J.—This is an application on the part of J. G. Waltham for the custody of his two children—the one a girl about eight years old, the other a boy about five years. Plaintiff and defendant are husband and wife, but now living separate and apart. The children are now living with their mother at a place in El Dorado county known as Wild Goose Flat, where plaintiff and defendant resided together for about eight months previous to their separation. In the month of October last, the plaintiff left and abandoned his wife and children, and has remained absent from them ever since. Previous to the issuing of this writ, defendant had commenced an action for divorce in El Dorado county.

In a general sense, that the father has a paramount right to the custody of his child is undoubtedly true. Why has he this right in preference to the mother? Is it on account of any absolute vested right? No. It is because the law, regarding what will be best for the child, supposes the father to be better capable of educating and supporting it, and when grown up, to advance its interests, than the

mother. It is a mistake to suppose that the father has an absolute right to the custody of his child. Where all things are equal he has the paramount right, because, as before remarked, the law, consulting the real, permanent welfare of the child, presumes it to be more for its interests to be under his nurture and care for maintenance and education. When, therefore, says Judge Story, the Court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interest of the infant, and if the infant be of sufficient discretion, it will also consult his personal wishes. *United States vs. Green*, 3 Mason's Rep., p. 485.

In the case of *Miner vs. Miner*, 11 Illinois Rep., p. 49, Mr. Justice Caton says, "Upon the extent of the legal right of the father to the custody and control of his children, many contradictory decisions are to be found." We think it clear, nevertheless, that he does possess that right, unless he has forfeited, waived, or lost it, either by misconduct, misfortune, or some peculiar circumstances, sufficient in the opinion of an enlightened Chancellor, to deprive him of it. In the event of a separation of the parents, this right must be conferred upon one of them. Next to the right of the father that of the mother must be recognized. These rights, however, are subject to the control of the Courts of Chancery, and when its aid is invoked, while it may not disregard the maternal rights of parents and the ties of blood, the best interests of the child must be primarily consulted. In no case do I find this legal right of the father asserted where a divorce has been granted for his fault or misconduct. At the suit of the wife, an action against the plaintiff for a divorce is now pending in the District Court of the Eleventh Judicial District. In this suit the character and conduct of the parties can be more fully inquired into than this Court was enabled to do in this proceeding, and consequently be better qualified to decide who ought to have the custody of the children. The application there will be addressed to the Chancery side of the Court; and Courts of Chancery have ampler jurisdiction, and are clothed with more discretion in these matters than Courts of Law on a *habeas corpus*. If the wife obtains a divorce in that case, the Court will undoubtedly award the custody of the children to her, provided no just objection against her is shown to exist.

Morrison vs. Wilson.

The testimony in this case does not disclose such strong, peculiar, and urgent circumstances as to justify me in interfering with the custody of the children at the present time, while an action for divorce is pending in El Dorado county. It appears from the evidence that the wife is an industrious, hard-working woman—her neighbors speak well of her—she has some property—the children are well cared for—they are happy and contented, and desire to remain with her. The father shows a most excellent character for industry and sobriety, and is engaged in an honest and useful occupation, but yet the evidence shows that he is not entirely free from blame. I can discover no justifiable cause for his desertion of his wife or children; he has remained absent from them eight or nine months—has made no effort at reconciliation, and during the whole period has failed or neglected to provide one dollar for their maintenance and support. He exhibits no desire for the care and custody of the children—evinces no disposition to educate, clothe and support them—until after his wife has instituted proceedings against him for a divorce. Then, and not until then, he discovers that she is an improper person to have their care and custody. His conduct excites a suspicion that, in instituting this proceeding, he was actuated more by a desire to harrass and annoy her, than from love and proper affection for the children. Again, the evidence shows that he is in insolvent circumstances—that already his creditors have attached the property of his wife for his debts. Under these circumstances I shall, for the present, at least, refuse to interfere with the custody of the children.

MORRISON vs. WILSON.*Twelfth Judicial District Court, July, 1857.*

EJECTMENT.

If F executes a mortgage upon real estate, and W stands by and is cognizant of its execution by F, and makes no claim to the property, then W is estopped from denying the title in F.

Action to recover possession of fifty vara lot No. 736, situate at the

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southwest corner of Fremont and Harrison streets. The complaint alleges that on the 21st September, 1853, one Henry A. Ford was owner in fee simple of the premises, and in their actual and exclusive possession, and that he mortgaged the same to Dennis G. Perkins. In July, 1856, Perkins obtained a decree of foreclosure, and sale of the property, and became the purchaser at Sheriff's sale himself. Perkins in May, 1857, conveyed the property, in fee simple, to plaintiff, who now alleges defendants entered upon the same, and unlawfully withhold possession.

Adverse title is set up by defendants. It is alleged in May, 1851, Perkins conveyed the lot sued for to one Minor, and that Minor conveyed the same to defendants for their own exclusive use and benefit, of all which plaintiff had full notice before the execution of the deed to him by Perkins. Defendant says that if Perkins acquired any title or legal estate by his purchase of the lot at Sheriff's sale, the same passed and vested in defendants before Perkins made the deed to plaintiff, and therefore he is estopped in law from maintaining his action against defendants. Possession for five years is also alleged, and therefore plaintiff is barred from recovering.

The testimony showed that in 1851 Ford claimed to be the owner of the lot, and employed Perkins, who was a builder, to erect a house upon the same. The present building situate upon the premises was put up by Perkins. Defendants, and Ford and his family, occupied the house from 1851 till the death of Mrs. Ford, in 1853, and it has remained in the occupancy of the defendants down to the present time. It further appeared that sometime in the year 1852, after the edifice was completed, Perkins filed and recorded his lien upon the building, amounting to upwards of \$1800; that he afterwards commenced suit for the purpose of foreclosing his lien, when Ford executed a mortgage in his favor for the sum due on the lien. Perkins, as alleged in the complaint, subsequently foreclosed the mortgage and purchased the property. The right of redemption in Ford expired sometime in the fall of 1856, and having failed to redeem, Perkins received a deed from the Sheriff. Before the commencement of this action he conveyed the lot in question to plaintiff. It was also shown that defendant Wilson had knowledge of the mortgage from Ford to Perkins, and was a subscribing witness thereto, and that he acknowledged the property belonged to Ford.

Morrison *vs.* Wilson.—Crockett *vs.* Seale.

The defendants introduced testimony tending to show that the house was their homestead ever since 1851.

G. F. & W. H. Sharp, for plaintiff.

Wistar & Irving, for defendant.

NORTON, J., charged the jury, that if plaintiff showed to their satisfaction that Ford had possession of the lot prior to defendant, the plaintiff was entitled to recover. If the jury found Wilson was in possession under Ford, the plaintiff must recover. If they believed Ford executed the mortgage, and Wilson stood by and saw Ford sign the same, and made no claim to the property, he, Wilson, is estopped from denying Ford's title; and finally, if they found Ford was the original party in possession, plaintiff was also entitled to a verdict in his favor.

The jury found for plaintiff.

CROCKETT *vs.* SEALE.

Fourth Judicial District Court, July, 1857.

RECEIVER—DEMURRER TO A COMPLAINT.

It is necessary, in an action by a receiver, that he should aver he represents the debt, or is authorised to sue for the same.

A receiver has no authority, *per se*, to sue in his own name, for a debt due the estate he represents.

The plaintiff, receiver in the affairs of Page, Bacon & Co., commenced this action for the recovery of \$228, money advanced defendant in February, 1855. Defendant demurs on the ground that the facts stated do not constitute a cause of action, and on the argument made the point that the complaint failed to show the authority of the receiver to bring this action, and in the absence of that authority shown, it was to be presumed against him.

Crockett & Page, for plaintiff.

McDougal & Sharp, for defendant.

Crockett vs. Scale.—Marshall vs. Buchanan.

HAGER, J.—The demurrer to the complaint for want of sufficient statement of facts, is well taken. Plaintiff substantially avers that in an action pending in this Court, he was appointed receiver of the assets, etc., of Page, Bacon & Co., with authority to collect the same by suit or otherwise; that having duly qualified as such receiver, and entered upon the duties of the office, there came into his possession a demand of Page, Bacon & Co.'s against the defendant for money lent, which was set forth in the complaint, and as such receiver he is entitled to demand and sue for the same, and asks judgment, etc. It does not appear that the plaintiff, in his character of receiver, represents the debt, or is entitled to sue. Ordinarily receivers, by the mere appointment of a court during the pendency of an action, have not authority to sue in their own names, even if a general power to sue be given, for an indebtedness or property due or belonging to the estates they represent. If plaintiff has a right of action in his own name, by special transfer or otherwise, it should be alleged; there is no intendment of law in favor of it, and it should appear by the complaint.

Demurrer sustained, with leave to amend.

MARSHALL vs. BUCHANAN.

Fourth Judicial District Court, July, 1857.

MOTION TO OPEN JUDGMENT.

Under what circumstances the Court may refuse to open a judgment where the application was made on the ground of surprise.

If the affidavits upon such motion show a discrepancy in the facts, the Court will not open the judgment.

Motion to vacate judgment, and for leave to come in and defend upon the answer filed. Judgment was entered on verdict in favor of plaintiff, on the 11th June, for \$400, value of certain cattle found to be wrongfully taken by defendant. The trial in this Court was *ex parte*, there being no appearance for defendant, but an answer to the complaint was put on file. Defendant deposes now, that, having

Marshall vs. Buchanan.—Delessert vs. Argenti.

heard a suit was commenced against him, he called upon the counsel who appeared, and on whom the process was served, and learned that he had put in an answer. Defendant, in a conversation with him, which resulted in an admission of the mistake made, went away supposing no other proceedings would be had until personal service of process was made on him, and therefore the trial was a surprise against which he could not have prepared.

In opposition, plaintiff's counsel read his own affidavit to the effect that, on the day he commenced this action, and while the clerk was preparing the papers, he casually met defendant and his attorney in company, and informed Buchanan that he had instituted a suit against him for the cattle. Defendant's attorney said that he need not go to the trouble of sending the Sheriff to serve the papers, but might leave them at his office. To this proposition Buchanan expressly assented.

Tingley, for plaintiff.

G. F. James, for defendant.

HAGER, J., did not think the application addressed itself to favorable consideration on the ground on which it was presented. Reference to the affidavits filed showed a discrepancy as to the facts, and did not disclose sufficient cause to open the judgment; those in support of the motion being equivocal, and that on the part of the plaintiff positive in averments.

Motion denied.

DELESSERT vs. ARGENTI.

Fourth Judicial District Court, July, 1857.

RECEIVERS.

It is contrary to good policy to allow receivers of partnership property to institute suits for the discovery of assets of the estate they represent, not claimed by the parties. It is necessary it should be done by creditors to whom the benefit accrues, and at their expense.

Delessert vs. Argenti.—Baker vs. Von Pelt.

This is a suit by the receiver in the action of *Cavallier vs. Argenti*, to set aside certain conveyances of real estate, alleged to be fraudulently made by Argenti & Co. to Madelina Cucchi, one of defendants. Plaintiff is receiver in the suit for dissolution of the partnership, and files this bill for the benefit of creditors, and also asks for the appointment of a receiver, and for an injunction.

The defendant demurs on the grounds that plaintiff has no right to resort to equity to discover assets, and that plaintiff has no authority to commence this suit.

E. Musson, for plaintiff.

McDougal & Sharp, for defendant.

HAGER, J., held it to be contrary to good policy to allow receivers to institute suits of this kind. The entire assets might be wasted by litigation in the attempt to discover property supposed to be improperly disposed of. Neither party to the original suit claims the property, and if it is necessary to commence proceedings, it should be done by creditors, to whom the benefit accrues, and at their own expense. The right of plaintiffs to sue has been decided in a similar case, *Crockett vs. Seale*, passed upon this term, (see p. 150.)

Demurrer sustained.

BAKER vs. VON PELT.

Fourth Judicial District Court, July, 1857.

DEMURRER—NEW MATTER.

The demurrer to new matter in an answer should specify the matter objected to, and not leave it to the Court to discover.

It seems the more proper remedy is to move to strike out the defense objected to, or to except to its validity on the trial.

In the complaint in this action the plaintiff avers, that on April 30th,

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1856, one N. B. Stone delivered to defendant sundry iron doors and shutters, weighing 30,345 lbs., to be sold on his (Stone's) account, and that at the same time defendant agreed to pay him three cents per lb. for the wares, as fast as they should be sold; deducting from the amount to be paid for the first sales \$157, advanced by Stone to defendants, and \$48 for drayage and labor. That on May 14, 1857, defendant rendered his account of sales to Stone, wherein he stated that he had sold 23,813 lbs., and that there was then due Stone \$714³⁹/₁₀₀, less \$157 and \$48, leaving \$509³⁹/₁₀₀. That on May 15, Stone assigned to H. Baker, the plaintiff in this action, an agreement, referred to in a subsequent portion of the complaint, and the above account of sales. That on the same day, while the account was in his possession, plaintiffs demanded payment of the \$509³⁹/₁₀₀, all or any part of which defendant refused to pay.

Defendant in answer, after denying the first two allegations of the complaint, says that the shutters and doors referred to were delivered to him by Stone, and one Morrison, attorney of G. D. Nagle, upon an agreement between Morrison, Stone, and himself, that he should sell them so as to net three cents per lb.; and that, after deducting expenses of sale, and all that might be received over that price, he should retain the residue of the proceeds until the final determination of a certain suit then pending in the late Superior Court of the city of San Francisco, in which Nagle was plaintiff, and one Homer defendant, and in which suit the said shutters and doors had been attached as property of Homer; and that if this suit should be decided in favor of Nagle, then defendant was to pay over the proceeds to him, but if the suit should be decided in favor of Homer, that then Stone should receive them, as Homer's attorney; and this suit defendant avers is now pending before the Supreme Court, having been carried there on appeal, after a decision in favor of Nagle, in the Superior Court.

The defendant avers some further facts, explaining this suit between Nagle and Homer, and finally denies, for want of information, the allegation of the complaint that Stone has transferred the account therein mentioned to plaintiff in this action, and says that if any such transfer has been made, it is insufficient to entitle plaintiff to maintain this action.

The plaintiff demurs to *that portion* of this answer which contains

Baker vs. Von Pelt.—Waldon vs. Haines & Dobinbish.

new matter, for insufficiency, and contends that the agreement therein set forth between Morrison, Stone, and defendant, and all the facts relating thereto, are insufficient in law to create a defense, on the ground that the same are contrary to public policy, and therefore void; and further states that all the parts of the answer not embraced in a direct denial of the allegations of the complaint, are insufficient to constitute a defense.

E. D. Sawyer, for plaintiff.

A. P. Crittenden, for defendant.

HAGER, J.—The demurrer is to the new matter set up as a defense by the answer, generally, (without specifying the particular new matter objected to,) on the ground that the defense is contrary to public policy. Strictly, the pleader should have specified the matter objected to, and not have left it to the Court to discover; but I think the more proper remedy would be to move to strike out the defense objected to, or to except to its validity on the trial.

WALDON vs. HAINES AND DOBINBISH.

Third Judicial District Court, July, 1857.

STATUTE OF LIMITATIONS—ENDORSEMENT—PARTNERSHIP.

An endorsement of payment upon a note, uncorroborated by evidence, is not sufficient to prevent the Statute of Limitations from attaching.

If the payment, as endorsed, was made before the partnership was dissolved, it was an implied admission of the debt, and the Statute of Limitations is no bar to its recovery; but if paid after the dissolution, there was no liability created upon the retired partners.

This suit is founded on a note made by Haines in the name of the firm of Haines & Dobinbish, in the year 1850, for \$1,600, at 5 per cent. per month interest. On the note was endorsed a credit of \$500, five days before the Statute of Limitations would have barred the debt.

Waldon vs. Haines & Dobinbish.—Travers vs. Bourdin.

This payment was made by Haines. Subsequently, and just before this suit was instituted, Haines, in the name of the firm, endorsed an acknowledgment that the residue of the note was unpaid, and that the debt was just, and was signed by him.

Nutter, for plaintiff.

Redman, Younger and Ryland, for defendant.

HESTER, J., held that a mere endorsement of payment appearing upon the note, uncorroborated by evidence, was not sufficient to prevent the Statute of Limitations from attaching. Held, also, that if the payment was in fact made at the time of the endorsement of credit, the partnership then continuing, such payment was an implied admission of the debt, and the Statute of Limitations was no bar to its recovery.

Held, also, that if the note was a partnership note, and the said endorsement to revive the debt was made by Haines, in the name of the firm, the partnership still then continuing, such endorsement took the case out of the operation of the Statute; but if the partnership had then ceased to exist, the endorsement by Haines did not create or continue the liability of Dobinbish.

TRAVERS vs. BOURDIN.

Fourth Judicial District Court, August, 1857.

JURISDICTION OF JUSTICES OF THE PEACE.

It must appear conclusively that the Justice of the Peace is prevented by sickness, or other disability, from presiding at a trial, before another Justice can preside in his stead, and hear and determine the action.

The judgment entered by a Justice in another township court, where this fact is not shown conclusively, will be set aside as void.

This was a suit to obtain a perpetual injunction, restraining defendant, Bourdin, and the Justice of the First District Court, and his suc-

Travers *vs.* Bourdin.

cessors in office, from taking any proceeding, or issuing execution in a certain judgment entered against plaintiff in said Court, and that the judgment be declared void. It appeared that Bourdin, in October, 1856, commenced an action against plaintiff, in the Justice's Court of the First Township, and the hearing of the same was adjourned several times, but was finally tried on the 27th October, 1856. That L. Ryan, Esq., the Justice of said Court, and defendants, were absent, but that D. B. Castree, the Justice of the Fourth Township, acting in the stead and during the temporary absence of the said Ryan, entered the default of defendants, and granted judgment against said Travers for \$114. Plaintiff further alleges that the Sheriff has seized under execution his property, by virtue of an execution issued by the present Justice of the First District, and has advertised the same for sale, and will proceed with such sale unless restrained by decree of this Court.

Plaintiff relies upon sec. 612, of the Practice Act, to vacate the judgment. It provides that in case of sickness, other disability, or necessary absence of a Justice, another Justice of the same county shall attend and hear the case on his behalf. As there was no proof of the sickness or other disability, of Justice Ryan, he contends Justice Castree was incompetent to act, and therefore all proceedings had before him were void.

G. F. James, for plaintiff.

Hubert & Tobin, for defendant.

HAGER, J., decided that the injunction should be made perpetual, and judgment be accordingly entered upon an examination of the record below, where nothing appeared to show that the Justice of the Court was prevented from hearing and determining the cause, either from sickness, necessary absence, or other disability, or that Justice Castree, of the 4th township, had either jurisdiction of the action, or authority to act in the 1st township, under the section of the Practice Act applicable to such cases. Jurisdiction and authority to act cannot be inferred; it must appear by the record, or otherwise; and in the absence of all proof, the imperative provision of another statute, (Comp. Laws, p. 754, §94,) that a Justice can hold a Court only in his own township, must prevail.

Eldridge vs. See Yup Company.

ELDRIDGE vs. SEE YUP COMPANY.

Fourth Judicial District Court, July, 1857.

EJECTMENT—TRUST—IMMORAL USES.

Real estate vested in A, for the use of B, cannot be bound by judgments or claims against A individually.

The power of A over it exists only for the benefit of the *cestui qui trust*.

If the trust fails, or is for immoral purposes, it goes back to the donor or author of the trust.

This was an action of ejectment brought by Eldridge against the See Yup Company, to recover the lot and buildings thereon on Pine street, known as the See Yup Asylum. Both parties claim title under the same deed, which was made in May, 1853, by Gay & Barbour to G. Ah Thai, "in trust for the use of a Chinese church, or place of religious worship and moral instruction," under the rules of the See Yup Company, for whom Ah Thai was then agent. The Company entered on the lot and made improvements to the value of about \$40,000. Edward Caney, in 1855, recovered judgment against Ah Thai for an individual debt, levied on the property, sold it, and obtained a Sheriff's deed. Subsequently, Caney sold and conveyed the property to plaintiff, who commenced this action. The defendant, by the agents of the Company, Wan Tin and Ah Chung, answered, setting up the deed from Gay & Barbour to Ah Thai, and alleging that Ah Thai was only agent for the Company, and bought the property *in trust* for them, by funds of the Company.

The case was referred to E. W. Taylor to take the evidence and report a judgment thereon, who, after hearing the proofs, found for the plaintiff.

This motion was made to set aside the report and finding of the Referee, and for judgment in favor of the See Yup Company.

On the trial before the Referee the following evidence was given touching the purpose for which the building is used: The house is used as an asylum for passengers who arrive from China, during their temporary stay here, previous to going to the mines. It is used also for men who come here from the mines, who belong to the See Yup Com-

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pany, to afford them shelter and assistance previous to their departure for China. A room or two of the building are used for idol worship, after the manner of the Chinese faith. The ceremonies are according to the Buddhist religion. The See Yup Company is composed of about 14,000 persons, residing in this State. Women are never admitted in the building or about the premises. There is one large idol in the room, which is worshiped; the adoration consists in bowing down, offering prayers, burning wood of certain kinds, and paper, and offering sacrifices of meats to the idols. The worship is to the presiding deities of different elements, and to remains of ancestors; but the principles instilled into the minds of the children are the maxims of Confucius, and are of a religious nature. There is no school of this kind in the See Yup building. About one fourth of the premises is used for idol worship.

Plaintiff contended, 1st. That the deed conveying the land to Ah Thai, created in him an estate *in fee*, being to him, "his heirs and assigns, forever;" and 2d. That even if the deed might ordinarily have created a trust, yet that such trust, in this instance, being partially for an immoral purpose, (idol worship,) would be void.

Stow & Brown, for plaintiff.

G. B. Tingley, for defendant.

HAGER, J., held that the property in controversy was vested in Ah Thai for the use of defendants, and his power over it existed only for the benefit of the *cestui qui trust*—and it could not therefore be bound by judgments or claims against him individually. Even if the legal estate be in Ah Thai, a sale of it under judgment and execution against him, cannot divest the beneficiaries of their right to the use and enjoyment of the property. If the trust fails, or is for immoral purposes, as contended by plaintiff, it goes back to the donor, or author of the trust. The *cestui qui trust* being in possession in this case, they cannot be ousted in this action.

Report of Referee set aside.

Mitchell vs. Welden.

MITCHELL vs. WELDEN.

Twelfth Judicial District Court, July, 1857.

CONVEYANCES—HOMESTEAD.

A deed of land conveys nothing without delivery.

It requires the signature of a wife to a deed to divest real estate of its quality of homestead, after being once so dedicated.

If a person leaves the State *temporarily*, the signature of the wife is necessary to convey the homestead, though she may be residing abroad with the husband ; but if he leaves *permanently*, it is not necessary.

This was an action of ejectment, to recover one undivided half of a tract of land situated at Hunter's Point. The facts were as follows :

Defendant, being owner, and in possession of the land in question, conveyed the same to Wm. B. Swain, on the 17th of February, 1855. On the 17th of April, of the same year, Swain conveyed to the plaintiff in this action. Welden was a married man at the time he executed his deed. He and his wife left California in January, 1853, under a contract of partnership, by which he was to repair to Shoalwater Bay, in Washington Territory, there to erect a saw mill, establish a trading post, deal in produce, &c., in connection with his partners, who were to attend to the interests of the firm in San Francisco. The contract was for one year. Welden went to Washington Territory with his wife, where they remained parts of the time, as late as March, 1855 ; but both were in the habit of making frequent visits to San Francisco, on which occasion they often visited the premises in question, where they had previously resided, and which they had cultivated, etc.

At the time he executed his deed to Swain, the defendant received a written agreement, executed by Swain, bearing the same date, agreeing that the deed was without consideration, and promising to reconvey the premises upon demand. This instrument was not acknowledged or recorded.

The plaintiff objected to any testimony offered by defendant on the subject of homestead under his separate answer, contending that the homestead, if any, was a joint estate, in husband and wife, and that

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the husband was estopped by his deed from any separate defense on this ground, no intervention being made by the wife, citing *Poole vs. Gerard*, 6 Cal. Jan'y, and *Sargent vs. Wilson*, 5 Cal. 504. The objection, however, was overruled, and the evidence admitted.

The plaintiff also objected to the introduction to the jury of the agreement to reconvey, on the grounds :

1st. That it was not under seal, acknowledged, or recorded, and that there was no fair proof of actual notice to plaintiff.

2d. That with or without notice to plaintiff it formed only an equitable defense, which was inadmissible in an action at law, to defeat a strictly legal title, vested in the plaintiff ; citing *Chitty's Pleading*, 2 7 Term Rep., 50 ; *Ib.*, 667 ; 2 *Greenleaf on Ev.*, 331 ; 2 *John. Cases*, 321 ; *Adams on Ejectment*, 32, and also modern cases in N. Y., since the change in the code of practice. 3 *Code Rep.*, 49 ; *Sandf.* 671 ; 4 *How. Pr. R.*, 272 ; *Ib.*, 317 ; 2 *Cal.*, 463 ; 4 *Cal.*

The objection was nevertheless overruled, and the evidence admitted, his Honor, however, expressing great doubt upon the subject of its propriety.

Counsel for the plaintiff argued that :

1st. The facts showed a *bona fide* residence of the defendant and wife out of this State, at the date of executing the deed, with a permanent *animus manendi*, and that the deed was good, and passed all defendant's title, the premises having thus lost their character of homestead ; and,

2d. That the plaintiff had no actual or constructive notice of the equity claimed to exist between Swain and Welden.

Defendant's counsel argued *per contra*.

Isaac J. Wistar, for plaintiff.

Love & Provines, for defendant.

NORTON, J., charged the jury as follows :

The plaintiff in this action must recover on his title alone. A deed from one person to another, conveying land, is of no effect and passes nothing until delivery. If the jury believe that the deed from Swain to plaintiff was not delivered before the commencement of this suit, he cannot recover. Residence with a family on the premises, *prima fa-*

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cie makes them a homestead. While the premises were a homestead it was out of Welden's power to convey them without the concurrent action of his wife. If, however, it had ceased to be their homestead, then the wife's signature is immaterial. At the time of the execution of the deed to plaintiff, the premises continued a homestead if the wife had not abandoned residence there. If Welden went to Washington Territory with the intention of making only a temporary residence or stay there, and of eventually returning to this State, as his home, then it was necessary for his wife to execute the deed conveying the premises, with him, in order to render it valid, to convey them, although she should then have been living in Washington Territory, and should have continued to reside there subsequently. But if they went there with the view of making it their permanent home, then it was not necessary for the wife to join. If Swain was bound by his written agreement made with Welden at the time the latter made the deed to him, then Mitchel, the assignee of Swain, is also bound, and therefore cannot recover. Undoubtedly Swain was bound to convey to Welden, whether Welden was indebted to him or not. The agreement was absolute. If, then, Swain would have been bound by the terms of this agreement, to reconvey the premises to Welden, Mitchel must show affirmatively that he bought and paid for the land in good faith, and without notice of this agreement, or he cannot recover.

The jury found for the plaintiff.

WILKINSON *vs.* WILKINSON.

Twelfth Judicial District Court, August, 1857.

DIVORCE—RESIDENCE—INTEMPERANCE.

The domicil of the wife is with the husband, as decided in *Kashaw vs. Kashaw*.

A party applying for divorce on the ground of habitual intemperance, must show conclusively that the habit exists at the time of the application.

This was an action brought for divorce on the ground of intemperance on the part of the husband, in the State of Massachusetts. It ap-

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pears that the wife resides in this State, and that the husband is in the State of Massachusetts, and that she left him in the year 1855. There was no evidence to show desertion on the part of the husband, nor any evidence of his being at the present time an intemperate man.

S. S. Rawson, for plaintiff.

Defendant not in Court.

NORTON, J., remarked, in delivering an oral opinion in Court, that the Supreme Court of the State had decided, in *Kashaw vs. Kashaw*, 3 Cal., 312, that the domicil of the husband was the domicil of the wife; and applying that rule, in the absence of evidence of desertion on the part of the husband, it was to be presumed that her domicil was still with him, in the State of Massachusetts, and consequently she could not maintain this action, not having resided in this State six months, according to the decision of the case of *Kashaw vs. Kashaw*.

The intemperance proved had existed many years since, and it was incumbent on the applicant for divorce, upon that ground, to prove the continuance of the offense, inasmuch as it is one of those habits which might be discontinued, and the defendant in this case, at the present time, may not be of intemperate habits. The desertion, as established, was on the part of the wife, she having left her husband. Upon these grounds the divorce was refused.

PEOPLE vs. BULLOCK.

Sixth Judicial District Court, July, 1857.

VENUE—IMPARTIAL TRIAL.

The fact that a fair and impartial trial cannot be had must be clearly and positively established. The venue will not be changed unless it clearly appears to be essential to the ends of justice. A publication, by newspapers, of the facts of a homicide, with comments and the evidence before the coroner's jury, is not sufficient to demand a change of venue.

The facts are referred to in opinion by the Court.

People vs. Bullock.

Motion to change place of trial.

F. Hereford, District Attorney.

W. H. Weeks, for defendant.

MONSON, J. The defendant in this case asks for a change of venue, on the ground that a fair and impartial trial cannot be had in this county. The court, when satisfied that such is the case, is authorized by statute to remove the cause to some other county, but the fact must be clearly and positively established. *People vs. Bodine*, 7 Hill Rep. p. 147. This rule is founded on good sense. As said by Chief Justice Nelson, (7 Hill Rep. 148) its practical operation will prove an essential check upon the facility with which these motions may be got up by the prisoner and his friends, from a too ready apprehension of undue influence—it will guard against any abuse of the practice by the prisoner, and at the same time afford him every reasonable means or opportunity of changing the place of trial, when undue prejudice and partiality really exist to an extent incompatible with a pure and wholesome administration of the law.

The mere prevalence of some excitement in a county upon the subject matter of a suit will not, of itself, authorize the court to change the place of trial. The court will not, from that fact alone, infer that a fair and impartial trial cannot be had; reliance will be placed upon the intelligence and integrity of jurors, and the venue will not be changed unless it clearly appears to be essential to the ends of justice. *Murray vs. N. J. R. R. Co.*, 3 Zab. 64; *Bowman vs. Ely*, 2 Wend. p. 250; *Messinger vs. Holmes*, 12 Wend. p. 203. The mere affidavit of the prisoner of his fear or belief that he cannot have a fair and impartial trial, is not sufficient to sustain the motion; but he is required to show, by independent and disinterested testimony, such facts as make it appear probable, at least, that his fears and belief are well founded. *Wormley's case*, 10 Gratt. p. 672.

In the above case it was shown that subscription papers had been circulated to raise a fee for the employment of counsel to aid in the prosecution, and that they had been signed by twenty or thirty persons. It was further shown, that shortly after the homicide was committed, there had been considerable excitement against the accused in

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the immediate neighborhood ; and that on several occasions persons had been heard to express the belief that the people would not bear an acquittal ; that some who were present at the inquest, and others who were present at the examining court, had expressed the belief that the people would have proceeded to put the accused to death, if the suggestion had been made by leading men present ; and one of the witnesses stated that he had heard a person say, that if the prisoner was acquitted by a jury, he would not be surprised if he was hung before he got far from the Court House ; that some six or eight persons were present on the occasion, who seemed to nod assent : yet as it did not appear that the excitement was general, nor that the inhabitants of the county generally entertained feelings of hostility towards the prisoner, the motion for a change of venue was denied, and properly so, said the appellate court.

In this case the motion is predicated upon the affidavits of the prisoner and his counsel. The affidavits allege that the homicide caused great excitement, and that the inhabitants of this county are greatly prejudiced against the prisoner. I am unable to discover (apart from the representation of the prisoner and his counsel,) any evidence tending to show that the citizens of this county have been so much and so generally excited with regard to the homicide, as to render a fair and impartial trial improbable, much less impossible. The mere fact that the newspapers, on the morning after the difficulty, published the particulars of it, and subsequently the evidence taken at the coroner's inquest, with editorial remarks expressing the opinion that the prisoner was guilty of murder, affords no sufficient ground for a change of venue. It does not prove that the people of this county are so much excited as to render a fair and impartial trial improbable. The homicide does not appear to have been a general and universal subject of conversation at any time ; it attracted some attention for a day or two in this city, but it does not appear that in the county outside of the city that it was ever much discussed. The newspapers referred to by the prisoner in his affidavit, only alluded to it in one or two publications. The editors did not continue to call public attention to it. No threats appear to have been made against the prisoner. It is not shown that any serious portion of the community are hostile to him. In fact, there is nothing in the evidence that would justify me

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in entertaining the supposition that the prisoner cannot have a fair and impartial trial in this county. I therefore deny the motion for a change of venue.

HALLECK, EXECUTOR, vs. GUY.

Fourth Judicial District Court, August 1857.

JUDICIAL SALES—STATUTE OF FRAUDS—NEW TRIAL.

A party cannot rely on a motion for a new trial, upon the fact that a sale of real estate is void because it was not in accordance with the statute of frauds, when that objection was not taken at the trial, or pleaded in the answer.

The section in our statute of frauds referring to auction sales applies only to personal property; a memorandum of the sale of real estate by the auctioneers, properly subscribed, will bind both parties.

Judicial sales are not within the purview of the act; and sales by the Probate Court, when confirmed, are regarded as judicial sales. A party wishing to object to the validity of a sale by the Probate Court, has the opportunity when the motion comes up for a confirmation of the sale.

At the sale of real estate, part of the property of the late Captain Folsom, which took place last November, under an order of the Probate Court of San Francisco County, defendant became purchaser of certain lots. With the exception of two lots, Guy held mortgages on the entire quantity so bought, for money loaned in 1854. Suit was brought by the executors of Folsom, for \$15,850, the amount of sales. On the 20th of May last, a decree was entered up against the defendant, directing him to make a credit of \$15,460 on the mortgage, and directing the payment in cash of the further sum of \$400, the amount of purchases on property not covered by the mortgage. A motion was made for a new trial, and argued and submitted on the 27th of June.

F. Billings and G. Yale, for plaintiffs.

Whitcomb, Pringle & Felton, for defendant.

HAGER, J.—Denied the motion, and stated, the ground relied upon

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on the motion for a new trial, namely: that the sale by the executors was void, because it was not in accordance with the statute of frauds, was not taken on the trial, nor set up in the answer, and ought not to be entitled to much consideration. Although the section in our statute in regard to fraudulent conveyances and contracts, relating to auction sales, applies only to personal property, yet it has been frequently held, under statutes substantially the same as ours in principle, that sales of real estate made by an auctioneer, at public auction, and properly subscribed by him, is a sufficient memorandum within the meaning of sections eight and nine of our Act. The decisions are based on the principle that the auctioneer is the agent, both of the vendor and vendee. It is also a recognised principle that *judicial sales* are not within the purview and meaning of the Act. The sale in this case having been made at public auction, under the direct order of the Probate Court, and afterwards confirmed by that Court, must be regarded as a judicial sale, and binding upon all the parties thereto, unless set aside upon proper and sufficient exceptions to its confirmation; so that an agreement in writing, signed or subscribed by the parties, was not necessary. In this case the defendant, Guy, had an opportunity to object to the confirmation of the sale by the Probate Court; if he did not do so it is his own fault. New trial denied.

GOODRICH vs. GREEN.

Fourth Judicial District Court, August, 1857.

FOREIGN JUDGMENTS—SERVICE OF PROCESS.

The Act of Congress providing that judicial records of one State shall have faith and credit in all courts within the United States, does not preclude inquiry into the jurisdiction of the courts where they are rendered.

Unless the court, when judgment was rendered, obtained jurisdiction of the person of defendant it is of no efficiency in this State.

The facts are fully reported in the opinion, the cause having been tried by the Court.

Goodrich vs. Green.

Wade & Flower, for plaintiff.

Thompson & Irving, for defendant.

HAGER, J. This action, according to the complaint and record evidence, is brought to recover the amount due upon a judgment obtained by plaintiffs on the 5th of March, 1855, in the Sixth District Court of New Orleans, Louisiana, against "A. P. Green, John McGeehen and Seddall, Green & Co., *in solido*." Defendant by his answer, among others, makes the following defenses: First—*Nul tiel record*. Second—He was not served with process in, and had no notice of the suit in which judgment was rendered; nor did he appear by attorney or otherwise in defense of the same.

The petition of plaintiffs, as disclosed by the record, states that the firm of Siddall, Green & Co., was composed of A. P. Green & *John McGeehee*; the citation, (process for appearance,) was issued February 3d, 1855, and was served by the sheriff, as appears by his return, on "defendants, through *J. O. Magee* one of the firm, personally," and defendants having made no appearance or answer, default and judgment was entered. There is some inaccuracy in the record that cannot well be explained. The service of the citation appears to have been made on *J. O. Magee*, as one of the firm, the petition gives the name as *John McGeehee*, and the judgment is entered against *John McGeehen*; yet, I suppose one and the same person is intended to be mentioned. Now, although under the law of Louisiana the service of process upon one member of a firm, may be sufficient to give jurisdiction—yet, I think it questionable, if exception was made, whether a court under any system of jurisprudence, would have held the return of the sheriff sufficient evidence of service of the process upon the defendants mentioned in the petition. The orthography is very different, and there is not *idem sonans* in the pronunciation.

It is also in proof that the defendant here sued arrived in the City of San Francisco about the 21st of December, 1854, and has not been beyond the limits of this State since that time. I am of opinion that plaintiff cannot recover upon the record alone, and that judgment should be entered for defendant.

The Act of Congress made to carry out Section 1, Article iv. of the

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Federal Constitution, providing that the judicial records of one State shall have the same faith and credit in all courts within the United States, as in the courts of the State whence they are taken, does not declare the effect of such judgments, nor preclude inquiry into the jurisdiction of the courts where they are rendered. By the record introduced, I think it doubtful if the court in Louisiana had jurisdiction of the person of either of the defendants in the original action, there is no proof or pretense that defendant Green was either served with process personally, or appeared in that suit. The court, therefore, had no jurisdiction of his person, and unless it obtained jurisdiction, both of the cause and the person, the judgment, as to him, has no efficacy in this State. Many of the authorities pronounce it a nullity.

Among the numerous decisions I will refer to the following: 7 New Hamp. 257, 11 New Hamp. 299; 1 Mass. 401-9, Mass. 462, 6 Pick. 354, 232, 4 Met. 333; 8 Cowen R. 292, 311, 6 Wend, 447; 4 Conn. 380, 6 Conn. 508. 17 Conn. 500; 7 Watts and Sear. 447, 2 McLean 473, 511, 2 McMullan 162; 3 Ala. 552, 4 Scam, 536, 3 Gilman 197; 13 Ohio 209. 6 Iredell 14.

A finding may be drawn for defendant according to the views indicated.

MOORE vs. ARRINGTON.

Fourth Judicial District Court, August, 1857.

FOREIGN JUDGMENTS—COPARTNERSHIPS.

After the dissolution of a partnership one partner cannot, without special authority, authorize an appearance for the other partner in a court of Justice; nor can service of process upon one of the partners of the late firm give jurisdiction to enter judgment against the other.

The facts of the case are reported in the opinion.

Wade & Flower, for plaintiff.

Haight & Haight, for defendant.

Moore vs. Arrington.

HAGER, J.—This action is brought to recover the amount of a judgment obtained by plaintiffs on the 18th of Feb., 1853, in the Second District Court of New Orleans, La. against Elliott Robbins, and Nicholas O. Arrington “individually, and also the commercial firm of Robbins, Arrington & Co.”

Defendant by his answer makes defense :

1st. *Nul tiel record* ; 2d Not served with the process, and did not appear or defend in the original suit in which judgment was rendered, etc.

By the exemplified record introduced in evidence it appears that in the original suit the process for appearance was issued April 26th and served April 27th, 1853, on Robbins, (Arrington does not appear to have been served) ; that an answer was put in by an attorney for Robbins, Arrington & Co., and that he did not appear at the trial.

The testimony discloses, that prior to the commencement of the suit the firm of Robbins, Arrington & Co. had dissolved, and Arrington had left the State of Louisiana, and gone to this State ; that the attorney who put in the answer is dead, and was retained by Robbins alone, to make defense for him, and was not in any way personally employed by Arrington.

After the dissolution of the partnership, Robbins could not, without special authority, have authorized an appearance for Arrington, even if he had attempted to do so ; nor could the service of process upon the former give jurisdiction to enter judgment against the latter.

Haslet vs. Street, 5 McCord, 311 ; *Loomis vs. Paones*, Harper, 470 ; 5 Stew. and Port., 293 ; 4 Porter, 181 ; *Mordon vs. Wyer*, 6 M. and Granger, 278 ; *Crane vs. French*, 1 Wend., 311.

For the reasons stated in the case of *Goodrich vs. Green*, page 168, the court in Louisiana had no jurisdiction of the person of the defendant in the original suit, and it is of no efficacy in this State.

Finding and judgment for defendant ordered.

Moore vs. Arrington.—Parks vs. Alta Telegraph Company.

PARKS vs. ALTA TELEGRAPH COMPANY.

Sixth Judicial District Court, July, 1857.

TELEGRAPH COMPANIES.

Telegraph Companies must be regarded as common carriers of messages, and subject to most, if not all, the provisions of the common law of carriers.

It seems that a Telegraph Company will be held liable for damages, upon the wrongful transmission of a message.

The facts are fully reported in the opinion which was delivered upon the demurrer to the complaint.

G. Cadwallader, for plaintiff.

Hartly & Carter, for defendant.

MONSON, J.—It appears from the complaint in this case, that defendants are engaged in transmitting messages, by telegraph, between Mokelumne Hill, and the city of Stockton, for which they charge and receive a certain pecuniary consideration. Plaintiff alleges that on the 7th day of October last, the defendants, in consideration of a sum of money paid to them, received from plaintiff a message, at the Mokelumne Hill Office, and agreed to deliver the same at Stockton with promptness and dispatch. The complaint then charges a breach of this contract; alleges negligence on the part of the defendants, and a loss in consequence to plaintiff of \$2000. The defendants have demurred to the complaint and deny their liability.

How far telegraph companies are liable for a violation of their contract in the delivery of messages, has, as yet, I believe, never been decided; or if decided, not reported. I have been unable to find a reported case in which the question has been examined. This is undoubtedly owing to the fact that Telegraph Companies are but of recent date.

In a work entitled Shaffner's Telegraph Companion, is published the answers to questions propounded by Mr. Shaffner to telegraphic and scientific gentlemen in Europe. Question No. 62, page 178, reads,

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“Have you ever paid damages by errors in messages, and has the responsibility ever been tried at law, and if so, please give the case.”

It is answered by Edward B. Bright, Esq., Secretary of the English and Irish Magnetic Telegraph Company, Liverpool, England. He says (see page 213): “We have never lost damages in any court.—The question of responsibility has been occasionally tried. The most recent case is one in which the British Telegraph Company were implicated.

“A manufacturing firm in Paisley having lately sent a message by telegraph to their London agent, ‘Return all printed squares above five shillings,’ and the message having been delivered with the word ‘scarfs’ substituted for ‘squares,’ which led to two days delay in the squares arriving in Paisley, the manufacturer brought a small debt action against the Telegraph Company and their agent for £12 damages, as loss sustained by them in consequence. The defendant denied liability, pleading the message order as a special contract, which contained a condition declaring that they would not be liable for mistakes. The sheriff took the case under advisement for a week, and then pronounced his decision sustaining the defense.

“Legal advisers, as a rule, do not like bringing forward such cases in the face of such conditions subscribed to by their clients upon the company’s paper.

“I consider,” says Mr. Bright, “that a claim cannot be well established, except in a case of a repeated or insured message, as a claimant would be met with, ‘why did you not insure if your message was of such consequence,’ seeing that the company has a special provision for such cases. And in case of any mistake, or non-delivery of an insured message, the company would be willing to pay, upon proof, without going to law.”

It will be seen that Mr. Bright admits the liability of telegraph companies in England, in the case of any mishap, or non-delivery of an insured message, and the reason given why they are not liable in the case of an uninsured message is, because it is expressly stipulated by the company, and subscribed to by the party sending the message, that the company shall not be liable; it is made a part of the contract. In the absence of such a condition, I think the company would have been held liable. The defendants here hold themselves out to the public as

Parks vs. Alta Telegraph Company.

prepared to receive, transmit and deliver all messages between Moke-lumne Hill and the city of Stockton; it is their public business and employment; they demand and receive a large compensation for the service rendered, and it receives its value alone from its accuracy and dispatch. Great trust and confidence have to be placed in the company by those transmitting messages, and their *mala fides* would be difficult of detection. As a legal consequence, then, must they not be regarded as common carriers of messages, and subject to most, if not all, the provisions of the common law applicable to carriers? The office of Post Master was an ancient common law office, exercisable by any and all persons, and against whom any person had his remedy for any damage that happened through their default. The common law knew no distinction in respect to the liability of a common carrier between a letter and any other thing. A private Post Master was precisely in the situation of any other carrier. [Angell on carriers, pp. 118, 103 and 112.]

I must overrule the demurrer, with leave to defendants to answer within ten days upon payment of costs.

LEE vs. EVANS.

Tenth Judicial District Court, July, 1857.

CONVEYANCE OF REAL ESTATE.

A grantee in a deed, absolute upon its face, cannot invalidate his own title, except on the ground of fraud, accident or mistake.

Parol evidence is inadmissible to contradict or deny the legal import of a written instrument.

The opinion embraces the principal facts of the case.

S. J. Field, for plaintiff.

Bryan & Filkins, for defendant.

BARBOUR, J.—First, Richard B. Lee, the plaintiff, on the 14th day of January, 1857, loaned to the defendant, O. M. Evans, the sum of five thousand dollars—at least the defendant acknowledges to have re-

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ceived this sum of money from him on that day. At the same time defendant executed and delivered to plaintiff a deed, with covenants of general warranty to a house and lot in the city of Marysville. This deed is absolute upon its face, and conveys the fee without any condition whatever.

Second, the defendant admits in his answer, that he borrowed the money of the plaintiff for the period of six months, for the hire of which he was to pay him an interest of three per cent. per month, and this he performed for the space of six months, and then refused to pay any further.

Third, defendant at the time of getting the money and making the deed, had before then given a lease of the house and lot to other parties; and on the 21st of April, 1856, he assigned the article of lease to plaintiff, who has since, through his agent, collected the rents and otherwise exercised acts of ownership. It is proved that the plaintiff accepted the deed, and that it was duly acknowledged and recorded at his request.

These comprise the chief facts in this singular case: not another instance can I find in all the Reports which I have examined, or in any of the elementary works, where the grantee in a deed absolute upon its face, has attempted to invalidate his own title. The plaintiff in his bill avers that the deed was made to secure him in the payment of \$5000, which the defendant borrowed, alleging that it was given only as a mortgage, and prays that it may be foreclosed. The defendant in his answer admits that there existed a parol defeasance to a certain extent, but contends that as it was a conditional sale, he, by a verbal arrangement with plaintiff, waived his right to redeem—placed plaintiff in possession, thereby making the sale in point of fact.

Judge Bronson, in the case of *Webb vs. Wright*, 1 Hill, 606, where he delivered a dissenting opinion, says he “never will be reconciled to the doctrine, that an absolute deed can, at law, be turned into a mortgage by parol evidence, nor that it can be done in equity, except on the ground of fraud, accident or mistake.” It is very clear in the case at the bar that none of these exceptions to the rule existed.—Evans gave just the kind of deed he intended, and Lee received and accepted what he had demanded before he paid the money. Judge Bronson (than whom there is none more eminent at this day,) con-

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tends, with great ability, for the correctness of the doctrine that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."

If the converse of this proposition be true, then there would be little safety in the enjoyment of a man's land, house or habitation; that solemnity which attends a contract made in the relation to the sale of real estate that secures the blessings of home and independence, would be done away with, and the tenure made to depend in a great degree upon the frail memory of witnesses. Chancellor Kent held that there was no rule of evidence better settled than that which declares parol evidence inadmissible to contradict or substantially to vary the legal import of a written instrument. *Stevens vs. Cooper*, 1 John. Chy. 429, and *Greenleaf Evid.* sustains the same rule in Vol. 1, Sec. 275, 276, 277 and 278. *Story's Equity*, section 1531, *Phillips' Evidence*, 1st Vol. p. 548, 566, 2d *Starkie*, 544, 550. I must admit, however, that many learned Judges have of late held differently. Among them are some of the modern New York Judges, including Chancellor Walworth and Justice Cowan. It is true that this rule does not apply to third persons, but only to such as are parties to the same instrument. Plaintiff's counsel relies upon a decision of the Supreme Court U. S., in 1st *Howard*, 127. The facts in that case bear but little similarity to those in this. In the former the sale was absolute and unconditional, yet there was a written defeasance, in the way of a bond, for the consideration of money, and a joint ownership, with a long unsettled account of former sales appertaining to the estate conveyed. In the present case, Lee took no note, bond or other evidence of debt, and he did that which I think concludes the whole case, by going into the possession of the property and now retaining it, with the full consent of Evans.

As I have said, the books do not afford an instance where a grantee has filed a bill with the view of having his property, conveyed him, declared of less estate and dignity of title than it purports to be upon the face of the deed; though cases are numerous wherein the grantor has brought his suit to have a deed decreed to be a mortgage, on proper allegations, or by creditors, where the estate conveyed was in fraud of their rights. After a careful consideration of all the authorities within my reach, I am of the opinion that it is contrary to the spirit

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of the statutes of fraud, of the maxims of common law, and of public policy, to allow parol evidence to construe the language of a deed, or other speciality. I think in this case the plaintiff has accepted title, both under the conveyance and by his subsequent acts, and further that he is estopped by the recitals in the deed.

It is therefore ordered and adjudged that the bill be dismissed at the plaintiff's costs.

LUNING vs. GORHAM.

Twelfth Judicial District Court, August, 1857.

PLACE OF TRIAL.

The place of trial in an action for foreclosure is determined by the county, and not by the Judicial District of the Judicial Court in San Francisco county.

This was an action to foreclose a mortgage. The land is situated in the Fourth Judicial District, and this action is brought in the District Court of the Twelfth Judicial District. Both Districts are in the county of San Francisco. The Fourth Judicial district comprises all that part of San Francisco county north of Bush, Kearny, and Clay streets, and the Twelfth Judicial District all that part south of Bush, Kearny, and Clay streets, and San Mateo county. A demurrer was put in to the complaint, on the ground of want of jurisdiction in the Court.

Bowman & Gray, for plaintiff.

G. F. & W. H. Sharp, for defendant.

NORTON, J., held that, according to sec. 18 of the Practice Act, actions for foreclosure of mortgages of real property shall be tried in the county in which the subject is situated; and as the land is situated in the county of San Francisco, the plaintiff should bring his action before one of the District Courts of that county. Inasmuch as there are two

Luning vs. Gorham—Travers vs. Travers.

District Courts in the County, the Act does not intend to confine a party to a Judicial District, but only refers to the County. The Constitution prohibits the division of a county for legislative purposes, but does not prohibit the establishment of several District Courts in the same county.

TRAVERS vs. TRAVERS.

Twelfth Judicial District Court, August, 1857.

DIVORCE—RESIDENCE—DESERTION.

If the husband should desert the wife she is entitled to select her own domicil, and it is required of her to obtain a residence of sufficient time in this State to sue for a divorce. She cannot claim her husband's residence here as her own, if it appear that she has selected another for herself. A want of support on the part of the husband must be proved to be wilful, and not merely the naked fact of neglect.

This was an action brought for divorce by the wife against the husband, on the ground of desertion and neglect to support. The facts are, that plaintiff and defendant being married, resided in Buffalo, New York; that during marriage they separated, apparently a mutual desertion, and the wife went to St. Louis, Missouri, to reside, and the husband came to California many years ago. She arrived in California in March, 1857, and in April filed this bill.

The referee found the fact of desertion true on the part of the husband as averred in the complaint, for three years previous to the bringing of this action.

Fabens & Tracy, for Plaintiff.

Defendant not in court.

NORTON, J., held that the facts in this case were directly the opposite of the facts in the case of *Wilkinson vs. Wilkinson*, decided this term (p. 162.) In this case it appears that after the desertion by the husband, the wife selected a domicil for herself in St. Louis. This she was authorized to do under the authority of the case of *Moffat vs. Moffat** (not reported.) It will then be necessary for the wife to

*This case was decided by the Supreme Court.

Travers vs. Travers—Elliott vs. Jewett.

reside in California six months before she can maintain an action of this nature. It is also found in the report of the referee that the husband failed to support the wife. This is not sufficient, as there is no proof that the wife ever made any demand for support, or that the husband knew that she was in need of it. She appears to have had the means of supporting herself. The fact must be wilful on the part of the husband, and such facts or circumstances must be shown as will authorise the conclusion that the refusal to support was wilful on his part. The divorce is refused, however, on the ground of residence.

ELLIOTT vs. JEWETT.

Twelfth Judicial District Court, August, 1857.

SUPPLEMENTARY PROCEEDINGS.

In supplementary proceedings the referee should not order a party to pay the amount of a note over to plaintiff, but should compel the delivery of the note.

This was a motion to set aside the report of a referee who was appointed on proceedings supplementary to execution, and who duly examined J. M. Jewett, a brother of the defendant, and reported that he was indebted to the plaintiff in the amount of a promissory note due his brother, and ordered him to pay the amount to the plaintiff, but made no report as to where the note was, or into whose hands it could be traced.

J. Clarke, for plaintiff.

Thornton, for defendant.

NORTON, J., held that the report of the referee should be set aside for error, as he had no power to order a maker of a promissory note to pay over the proceeds to a plaintiff, when, in point of fact, the note itself may be in the hands of an innocent party. The proper course is, for the referee in such proceedings to trace the note itself, and then order the note to be given over, provided the defendant has an interest in its result. Any other rule than this would work mischief and prevent the legitimate end of this provision of our statute.

Robinson vs. Coady.

ROBINSON vs. COADY.

Twelfth Judicial District Court, August, 1857.

CONSIDERATION—DEMAND.

What constitutes a promise to pay, in a written obligation. When a promissory note is payable at a particular place in this State, payment must be demanded there.

This is an action on two obligations, one of which is in the words and figures following, to wit:

“Due Wm. H. Robinson & Co. two hundred and two dollars, value received. \$202. Stockton Jan’y 28, 1850. (Signed,) R. COADY.”

The other was a promissory note in the usual form, and was payable at the store of Mackintosh & Co., but the complaint fails to aver that it was presented at the store of Mackintosh & Co. for payment at the time when it became due and payable, but there is a general averment as to both, that payment was duly demanded.

Defendant demurred to the complaint on the grounds,—

1st. That the first obligation set forth was not a promissory note in the purview of the law, and the complaint should therefore aver a valid consideration.

2d. That as to the second obligation the complaint should have averred a demand at the place where the note was payable.

M. F. Furman, for plaintiff.

E. Casserly, for defendant.

NORTON, J., held that he should have to consider the first obligation sued on as a promissory note, although he was surprised to find so little authority upon the question, where such instruments as this are so common. The case of *Russel vs. Whipple*, 2 Cowen 135, approved in the case of *Luquee vs. Prosser*, 1 Hill 256, is the only case directly in point, and it was there held that a due-bill in this form substantially, was a promissory note within the statute.

As to the obligation to the second note, it is error not to aver demand of payment at the place where the note was made payable, as decided by our Supreme Court in *Wild vs. Van Valkenburgh*, January

Robinson *vs.* Coady—King *vs.* Murphy.

Term, 1857. A general averment of a due demand is not sufficient where a special demand is necessary.

The demurrer is overruled as to the first cause of action, and sustained as to the second, with leave to amend upon payment of costs.

KING *vs.* MURPHY.

Fourth Judicial District Court, August, 1857.

PUBLIC OFFICERS—ASSAULT AND BATTERY.

A constable acting as a public officer, has a right peaceably and without force, to enter premises in the discharge of his duties in serving his writ of attachment.

Having attached property in certain premises, he is entitled to visit it unmolested, in order to maintain his custody, and he is at liberty to remove the property.

Action to recover \$10,000 for alleged injuries suffered by plaintiff by reason of an assault and battery committed by defendants. The complaint sets forth the following allegations: On the 3d day of April last, plaintiff, who is constable of the Second District, received a writ of attachment issued out of the Justice's court in a suit where defendant, Murphy, was plaintiff, and one Freeman, defendant, and in pursuance of such writ plaintiff took possession of the goods of said Freeman, with his consent, he having surrendered to King the keys of his house. That on the 9th day of April, while he was in possession of the property, defendants, with force and arms did seize and strike plaintiff with a metallic head or stick called a "Billy," and with great force did beat plaintiff and knock him down, and while down the defendant struck the plaintiff with the said instrument known as a "Billy." It is alleged that the plaintiff was by said beating rendered prostrate and insensible and that defendant did then and there choke the plaintiff, and tore and injured his clothes to the amount of fifty dollars. By means of all which plaintiff was confined to his bed for the space of nine days, and during that time and subsequently suffered great pain and distress, and was hindered and wholly disabled from transacting his daily business and was forced to lay out the sum of eighty dollars for medical attendance.

Defendant admits most of the allegations of the complaint, but denies

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the assault and battery, and alleges that if he did commit any upon plaintiff, he committed it in defending himself against an assault first committed upon him by the plaintiff.

The evidence introduced by plaintiff showed defendants to be owners of property on Stockton street, between Vallejo and Green streets, worth between \$4,000 and \$5,000, and a portion of it was leased to a colored man named Freeman. This tenant having gone in arrear for rent, Murphy commenced an action in the Justice's court of the Second District for its recovery, and the attachment issued was put in the hands of King.

The latter levied upon the property, left it in the premises, locked them, and took the key; it appeared that, some days subsequently, the constable returned to the premises and commenced removing the property.

At this moment, Murphy seeing a chair passing out and discovering the presence of King, interfered for the purpose of ejecting him from the house. A rencontre took place, and several witnesses for the plaintiff and defendant testified, though very differently, as to the circumstances of the conflict and the manner in which it commenced. It appears, however, that the plaintiff received several severe contusions and bruises.

T. C. Hambly, for plaintiff.

Geo. F. James, for defendant.

HAGER, J., after explaining the admissions and allegations made by the pleadings, and referring to the testimony applicable thereto, stated that a constable had a right peaceably and without force, to enter premises for the purpose of executing a writ of attachment; that he might also after a levy was made and with the consent of the tenant legally in possession, leave and lock up the property on the premises; and by virtue of his writ and levy he could afterwards legally revisit the premises, and, if he saw fit, remove the whole or any portion of the property to another place. He is liable personally and also upon his official bond, for its safe keeping, and he is also responsible for illegal and unauthorised acts, and it should be left for him to judge what is best for the safety of the property, unless the party for whom he acts

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gives directions by which he may be relieved from liability. These officers are also conservators of the peace in their respective townships, and if they are attacked or molested whilst in the legal performance of their duties, they have power to arrest the aggressor and call upon the bystanders for assistance. Public officers should be protected in the performance of all duties imposed upon them by law. If an illegal and unjustifiable attack has been made upon the plaintiff whilst in the legal performance of his official duties, he is entitled to compensation by action for the damages sustained.

The damages in such cases are not confined merely to the corporal injury sustained by plaintiff; but if the jury should find for him, they are at liberty to award such exemplary damages as in their judgment the circumstances of the case may require.

The jury found for plaintiff, \$750.

DANA vs. STANFORD.

Twelfth Judicial District Court, August. 1857.

CREDITOR'S BILL—EXECUTION.

The original remedy by creditor's bill is not impaired or superseded by the provisions of the statute regulating proceedings supplementary to execution.

Where a defendant confesses that he has no property, there is no necessity for an execution at all, as it would then be utterly useless.

In this case, the plaintiff, a judgment creditor of Samuel Deitz, filed a complaint in the nature of a creditor's bill to set aside an assignment made by Deitz to Stanford Brothers, and to have certain property and assets applied to the payment of his judgment.

The complaint shows that the plaintiff's judgment was for \$3,602.50, recovered in the Twelfth District Court on the 6th day of June, 1857; that execution issued to the sheriff on the same day: that the sheriff after making diligent search and inquiry for property of Deitz, on which to levy said execution and make the money therein specified, was unable to find any property, and afterwards, on the 11th day of June, 1857, he, the sheriff, returned the execution *nulla bona*. It also alleges that on the 18th of April last, and after the plaintiff's

debt was contracted, said Deitz was carrying on a large business in San Francisco and Sacramento, and owned property of the value of \$40,000 which he assigned and transferred to Stanford Brothers; that at the time of this transfer, Deitz was in failing circumstances, and that Stanford Brothers were among his creditors, and that the property so transferred constituted all Deitz's property; that such transfer was made for the purpose of preferring Stanford Brothers; and that Deitz retained an interest in the property; and that the transaction was made to hinder, delay, or defraud the other creditors of Deitz, and especially the plaintiff. The plaintiff therefore prayed to have the assignment set aside as fraudulent and void, as against him, and to have a sufficient amount of property applied to the payment of his judgment.

The defendants, Stanford Brothers, demur to the complaint on the following grounds:

1. A creditor's bill is not allowable in this State, the Legislature having provided an adequate remedy by proceedings "supplemental to execution."

2. The action is premature, the execution having been returned by the Sheriff, after having been in his hands only *five* days.

3. The complaint should have set forth the particular assignment, so that the court could judge whether it was fraudulent or not.

S. M. Bowman, for plaintiff.

Crockett & Page, for defendant.

NORTON, J.—It has been held by this court, and also by the Supreme Court, that the original remedy by creditor's bill, in cases like this, is not impaired or superseded by the statute allowing certain proceedings supplementary to execution, the statute being cumulative to the original chancery remedy. This is not a bill for discovery. The complaint shows that all the property of the debtor was assigned to Stanford Brothers, and mentions the particular property, and shows that Deitz had no other property.

There can be no objection to the complaint on this ground.

The defendant's counsel cites some authority in New York showing that a creditor's bill cannot be maintained until after execution has

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expired ; but those cases were cited under a particular statute in that State, and are not applicable to a case like this. It is stated in the complaint that the debtor has no property in his hands whatever, and that it has all been transferred to Stanford Brothers. This being confessed by the demurrer, there was no necessity for an execution at all, as the effort to pursue the debtor's property under such circumstances was utterly useless. The Supreme Court, in a recent case, has decided that a creditor's bill may be maintained in some cases before judgment.

The complaint states that this assignment was made to prefer creditors. If so, it was fraudulent as to the plaintiff. It also shows that the debtor retained an interest in the property assigned, and if so, the assignment was void on this ground also, and there was no necessity for setting out the particular agreement or instrument by which the assignment was made.

The demurrer is overruled with leave to defendants to answer, by paying costs.

ROOP vs. HUMPHREYS.

Twelfth Judicial District Court, August, 1857.

MALICIOUS ARREST—DEMURRER.

In an action for maliciously arresting plaintiff in a civil suit, the complaint must show, either a termination of the former suit in favor of present plaintiff, or his discharge from the arrest by order of the judge.

Roop complained that Humphreys in a civil action in the same court in which Humphreys was plaintiff and Roop & Roop defendants, "wrongfully and without legal cause or justification," procured from Edward Norton, judge of said court, an order of arrest commanding the sheriff to arrest this plaintiff and hold him to bail in \$1175; that Humphreys caused plaintiff to be arrested under said order, and imprisoned for twenty-one hours, and until plaintiff was obliged to give, and did give bail in said action,—whereas Humphreys at, &c., "had no just cause nor legal authority for said proceeding against plaintiff."

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That plaintiff was greatly injured and had to expend \$200 in procuring his release.

Damages laid at \$3,000.

General demurrer.

Campbell & Pratt, for plaintiff.

J. Clarke, for defendant.

Defendant's points :

1. That there is no malice shown.
2. That there is no want of probable cause shown.
3. That there is no termination of the original action shown.

Defendant cited, 2 Chitty, Pl., 600, notes ; 3 Phill. Ev., 255-260 ; 2 Greenleaf Ev., Sec. 454-5-7, 449 ; 1 Greenleaf Ev., Sec. 78 ; *Boyce vs. Brown*, 7 Barb., S. C. R., 84 ; *Russell vs. Clapp*, 4 How. Pr. R., 374 ; *Mattoon vs. Eder*, 6 Cal. R., Jan. T.

Demurrer sustained with leave to amend.

Amended complaint set out that defendant "maliciously, and without any reasonable or probable cause," caused plaintiff to be arrested under process issued in a civil suit, setting out fully, facts to show malice or want of probable cause—but is silent as to termination of first suit or discharge of plaintiff from the arrest.

General demurrer.

Defendant relies on complaint not showing termination of first suit, or discharge of plaintiff by order of the court or judge, and cites :— 6 Wendell, 418 ; 7 Cow., 715 ; 2 Selwyn., N. P., 1067 ; 20 Barb., S. C. R., 441 ; 7 Cow., 715 ; *Mattoon vs. Elder*, 6 Cal. Jan. T.

Plaintiff cited, 16 M. & Welsby, 200, *Daniel vs. Fielding*, and contended that under a practice of arrest and bail, by statute in England, similar in substance to that of California, the old common law rule requiring a termination of suit to be shown, was there abrogated and no longer necessary.

NORTON, J.—Sustained the demurrer, and decided that under the practice act of California, it was essential to show either a termination of the original suit favorably to defendant, or his discharge by order of the court or judge.

Bagley vs. Eaton, Adm.

BAGLEY vs. EATON, ADM.

Fourth Judicial District Court, August, 1857.

LOST INSTRUMENT—AFFIDAVITS.

Affidavits, offered to prove the loss of an instrument, are admissible to lay the foundation for secondary evidence, but are not allowed to prove the instrument itself. If they go beyond the proof of the loss and attempt to explain the contract, they are so far inadmissible.

Where promissory notes were given to the maker by the payee, and destroyed by the maker with the payee's consent, the payee should conclusively show that the notes were not paid.

This was an action to recover \$14,000, balance alleged to be due on three promissory notes made on the 22d March, 1851, by Grove C. McMickle, and payable to Bagley & Sinton. The notes were to bear interest at five per cent. per month; and were afterwards assigned by Sinton to Bagley.

Plaintiffs introduced and read in evidence the two following affidavits, to show the destruction of the notes, and to lay the foundation for proving their contents by secondary evidence.

David T. Bagley, the plaintiff in the above entitled action, being duly sworn, says: On the 22d day of March, A. D., 1851, Grove C. McMickle made and delivered to the firm of Bagley & Sinton three promissory notes of that date, described and referred to in a certain instrument in writing of that date, signed by this plaintiff and R. H. Sinton and Grove C. McMickle, and acknowledged before J. P. Haven, Notary Public; that said notes remained in the possession of said Bagley & Sinton for some time after their maturity, and in the demand for the same said Bagley & Sinton had been very lenient and indulgent to said McMickle, and had resorted to no legal proceedings to collect the same; and that said McMickle had repeatedly requested said firm not to sell or negotiate said notes, and fearing a negotiation to some person who might be more rigorous in the collection of the same, the parties all together, viz; said Bagley, Sinton and McMickle, consented and agreed that said notes, for the sole purpose of preventing their negotiation into the hands of some other party, or of their getting into the market, might be destroyed, and believing also that the rights of the parties would remain the same as before the destruc-

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tion ; and the said notes were then and there, to wit : about the 15th day of August, A. D., 1852, torn up into small pieces and thrown away in the presence of all the parties. That said destruction was done for the purpose aforesaid, and by the agreement of the parties was not to affect the right of the said Bagley & Sinton to recover on said notes, and with full intent on the part of all the parties that the rights of the parties should be as if the notes had continued to exist.

Richard H. Sinton, being duly sworn, deposes and says : That on the 22d day of March, A. D., 1851, Grove C. McMickle made and delivered to the firm of Bagley & Sinton (then composed of the plaintiff and this affiant,) three promissory notes of that date, being the same referred to and described in a certain instrument of writing of that date, executed in duplicate by said Bagley and McMickle and this affiant under their respective hands and seals, and acknowledged by them respectively before J. P. Haven, a Notary Public, on the same day. That said notes remained in the possession of said Bagley & Sinton for some time after their maturity, and that, in the demand for the same, said Bagley & Sinton had been very lenient and indulgent to said McMickle, and had resorted to no legal proceedings to collect the same, and that said McMickle repeatedly urged said firm not to sell or negotiate the said notes, as he feared a negotiation to some person who might be more rigorous in the collection, and believing he had a claim for indulgence on said firm, and having a great objection to his paper being hawked about in the market,—the parties altogether, to satisfy said McMickle, and to prevent a negotiation of said notes into the hands of some other parties or their getting into the market, consented that the same might be torn up or destroyed ; and, according to the best recollection and belief of this affiant, the same were torn up into small pieces about the 15th day of August, A. D., 1851, and thrown away, in the presence and by the consent of said Bagley & Sinton and said McMickle, but with the distinct understanding on the part of all, that the claim of said Bagley & Sinton on said notes against said McMickle should remain exactly as if said notes still existed, and that said Bagley & Sinton consented to the same only to satisfy said McMickle as aforesaid, and with a full belief on their part that their claim on said notes was not affected thereby, and that the evidence of the same contained in said instruments of the date of 22d March, 1851,

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would fully prove the same, and be all that would be necessary to enforce their collection.

Plaintiff then introduced an agreement or bond entered into between McMickle and Bagley & Sinton, dated March 22, 1852, showing the circumstances under which the notes were given. It appeared by this instrument that McMickle during his life time agreed to purchase from Bagley & Sinton, and they agreed to sell him, a lot at the northeast corner of Kearny and Pacific streets, for \$14,000. Deceased paid on account of said purchase \$8420. On the 22d of March, 1851, the date of the bonds, it was ascertained that the amount due Bagley & Sinton was \$6580, for which sum the notes now in controversy were given. The bond contained the following condition to which the notes and purchase are subject: "That if the said McMickle shall well and truly pay to the said Bagley & Sinton, or their assignees, the said notes at maturity, then the said Bagley & Sinton agree and hereby bind themselves to execute to the said McMickle a quit-claim deed of all their right, title and interest in and to the aforementioned lot of ground. But if the said McMickle shall make default in the payment of any one or all of the said notes, then the said McMickle is to forfeit all right in the said lot of ground, and the said Bagley & Sinton are hereby authorized to make such disposition thereof, discharged of all claim or pretence of claim or interest in the same on the part of said McMickle, as they may see fit."

The plaintiff then rested, and defendant's counsel expressed their readiness to go to the jury on the case as it then stood.

Hoge & Wilson, for plaintiff.

Glassell & Leigh, for defendant.

HAGER, J.—The bond is sufficient evidence of the making of the notes therein described. The affidavits of plaintiff and Sinton are addressed to the court for the purpose of accounting for the non-production of the notes sued upon, and laying the foundation for secondary evidence, and are not evidence for the jury. These affidavits show that the maker of the notes peaceably acquired their possession and destroyed them with plaintiff's consent. Under these circumstances, I feel it my duty to instruct you that there is no testimony to

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show that there is any amount due upon the notes sued upon. This is the third trial of this case, but it is the first time it has come up in this form; heretofore Sinton was introduced by plaintiffs as a witness, and explained the delivering of the notes to the maker.

I can only regard the affidavits as in evidence to satisfy the court the notes cannot be produced upon this trial, and to authorize secondary proof of their contents; but as they trace the notes to the possession of their maker, and disclose that they were destroyed by him with plaintiff's consent, it raises no presumption that they were unpaid in whole or in part; but on the contrary, regarding the affidavits only as proving the destruction in the manner disclosed—by the maker with the consent of the owners—it raises an opposite presumption in favor of the former, which plaintiff is bound to explain by additional evidence. The affidavits themselves contain an explanation, but in this respect they go beyond their true purpose. Defendants had no opportunity to cross-examine the affiants, and this court cannot give any greater force and effect to the affidavits than was asked for them when they were introduced, and there is no proof to rebut the presumption in favor of the deceased maker of the notes.

If plaintiff can recover upon the testimony as it now stands, then any person who pays a note, takes it up and destroys it, may be compelled to pay it a second time if he is not prepared to defend by proof of actual payment. Merely taking up his note and destroying it would be no protection, if the then holder could, as the plaintiff here has attempted to do, compel him afterwards, by bringing suit and making affidavit as in this case, to show an actual payment. To establish such a principle of law, would not only be dangerous, but also be taking away what has been regarded as the best and most ordinary protection and safeguard that a party has when he makes payment of obligations of this kind.

The jury found in favor of the defendants.

Conroy vs. Woods.

CONROY vs. WOODS.

Twelfth Judicial District Court, August 1857.

COPARTNERSHIP PROPERTY.

Where a person purchases partnership property, subject to partnership debts, and a third person gives him credit with a knowledge of this fact, the property will remain liable for the partnership debts, and cannot be taken to pay the individual debt of the purchaser.

When such a lien has been acquired, he may apply to a court of equity to enforce or protect his rights.

The facts of this case are sufficiently referred to in the opinion of the court, to give a correct view of its merits. The decision was given on a motion to dissolve an injunction restraining one of the defendants from selling under execution partnership property to pay an individual debt of one of the copartners.

Joseph Simpson and C. V. Grey, for plaintiff.

G. F. & W. H. Sharp, for defendant.

NORTON, J.—The material facts in this case are, that Brooks and Moore being members of a firm composed of Bonney, Brooks & Moore, sold out their interest in the property of the firm to Bell, subject to the partnership debts. Bell then sold to Bonney. Subsequently to this, Woods obtained a judgment against Bonney, and has levied upon and is about to sell this property as the individual property of Bonney. The plaintiffs have since commenced an action against all the members of the firm on a copartnership debt, and have attached the same property and obtained judgment, and have issued execution. This bill is filed to restrain the sheriff from paying over the proceeds of the sale to Woods, and asking a decree that those proceeds be first applied to the payment of their debt.

Inasmuch as the sale to Bell by Brooks and Moore was not of the property itself, but only their interest in it subject to the partnership debts, there is no doubt that the property still remains liable to the payment of the partnership debts, and the knowledge of Woods of the whole transaction precludes him from claiming any benefit on the ground

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of having given Bonney credit upon the apparent ownership of the property.

It is a settled principle of equity, that partnership property must be applied to the payment of partnership debts in preference to the debts of the individual partners, but the mode of enforcing this principle is not entirely settled. It is sometimes said that it is not a distinct legal right of the creditor, which he can apply to a court directly to enforce or protect, but it is only a rule which a court of equity will observe in distributing partnership effects over which the court may have obtained jurisdiction upon other grounds. In the case of *Robb vs. Stevens*, (Clark's Ch. Rep., 191,) it was held that an action like this, brought by a creditor at large, could not be sustained, but this was apparently upon the ground that no specific lien or equitable claim upon the property, had been acquired by judgment or execution, and the Vice Chancellor speaks of the right as liable to be affected by *execution*, death and bankruptcy. In the case of *Jackson vs. Cornell*, (1 Saund. Ch. 348) it was decided in an action by a judgment creditor, that an assignment made by an insolvent upon trusts in violation of this equity,—that is, in trust to pay copartnership debts out of individual property in preference to the individual debts, was fraudulent and void as against the individual creditor. If this decision is correct it can only be on the ground that this equity is a distinct equal right of the creditor, at least after he has acquired a specific lien or right by judgment. I think that this view of the character of this right is correct, and that when such a lien has been acquired, the creditor becomes invested with a right which he may apply to a court of equity to enforce or protect. If then, the right of priority of payment is exposed to be defeated or greatly embarrassed, by a sale of the property as the individual property of one of the partners, as in this case, and can only be adequately protected by the exercise of the equity powers of the court, I can see no objection to entertaining this action.

The injunction must be modified so as to allow the sheriff to sell the property and deposit the proceeds with the clerk of this court, subject to the further order of the court.

Merced Mining Company vs. Lockwood.

MERCED MINING COMPANY vs. LOCKWOOD.

Thirteenth Judicial District Court, August, 1857.

INJUNCTION—ACTION TO QUIET TITLE.

Where a party, applying for an injunction to restrain the committing of waste by another, and in his bill avers an adverse title in the trespasser, the injunction cannot be granted.

Motion to grant an injunction, and bill to quiet title. The case is stated in the opinion.

The names of counsel have not been furnished.

BURKE, J.—This is an action to quiet title, and prevent trespass, for which an injunction is asked, and brought against R. Lockwood, J. D. Hudgin, J. C. Fremont, et al. The plaintiff alleges in the complaint that it is an incorporated Company, organized for the purpose of quartz mining, and sets forth the charter, &c., and avers that soon after its organization “it became, and still is, the owner and possessor” of certain described real estate and veins of gold-bearing quartz, and sets forth the names and localities thereof. That plaintiff took possession in May, 1851, when the said land, etc., “was unclaimed by J. C. Fremont, or any other person,” and have, from that time on, been working the same, and have expended in permanent improvements thereon upwards of \$800,000. And that John Charles Fremont, in May, 1851, publicly and repeatedly disclaimed having any title thereto, whereby the plaintiff was induced to make valuable improvements on said land.

And that defendants claim an estate and interest in said land and quartz veins adverse to plaintiff's title. That Fremont and Lockwood claim by deed from Alvarado to J. C. Fremont, which defendant falsely claims vested a legal title in fee simple to all the said property mentioned, “because the said Fremont has obtained a patent from the United States of America, signed by Franklin Pierce, the President thereof,” which patent is recorded in the General Land Office, at Washington, dated Feb. 19, 1855, pursuant to a decree of the Supreme Court of the United States, dated Dec., 1854, confirming unto the said Fremont, as assignee of the said Alvarado, ten square leagues of land.

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And which patent, as defendants claim, was issued in pursuance of the Act of Congress, "to ascertain and settle private land claims in California," passed March 3d, 1851, upon the presentation to the Commissioners of the General Land Office, of a transcript of the plat and certificate of the survey of the said tract, duly certified by the Surveyor General of the United States, for the State of California, dated July 31, 1855; which patent embraces all the property which the plaintiff took lawful and peaceable possession of, as before stated, in May, 1851.

That the Alvarado grant was a "float" for grazing and agricultural land, to be located within boundaries described in the grant, embracing over one hundred square leagues. That Alvarado made no settlement on the grant. That he sold to Fremont for the paltry sum of three thousand dollars. That Fremont did not attempt to survey the undefined ten square leagues until 1849, which survey then made did not approach within two miles of any of the property owned by plaintiff, nor within nine miles of the valuable mines now owned by plaintiff.

This map and survey, so made by Fremont, was published and presented with the claim to the Land Commissioners. And the said Fremont disclaimed any right or title to any other land under his Alvarado grant, than the ten leagues so surveyed by him, until July, 1855, when another survey was made by the Surveyor General, embracing the property so owned and possessed by this plaintiff. That the last survey was made while an appeal was pending concerning the grant, and that therefore the survey, and the grant issued thereon, are both void. That this last survey was fraudulent and void, it having been made clandestinely, and upon mineral lands.

The complaint further shows that the defendants are now actually trespassing on some portions of said veins, and that they avow their intention to continue so to trespass upon the same; and that they are doing great and irreparable injury to said mines; and that plaintiff is informed and believes that defendants are unable to respond in any amount of damages.

And alleges further, that none of the defendants have any color of title, but are naked trespassers; and that all the defendants, except Lockwood and Fremont, are merely holding possession of the veins for

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the purpose of paying themselves, out of the proceeds thereof, money due them from Lockwood.

The plaintiff prays for an injunction *pendente lite*, and that on the final hearing, the same may be made perpetual; and that a decree be entered against the defendants that they have no interest or estate in, or to, the premises in question. The injunction is asked for upon the facts set forth in the complaint.

Formerly no court of equity would grant an injunction in a cause where it was shown, either by the complaint itself, or by the verified answer, that the defendant claimed an adverse title. Lord Eldon remembered the time when, if a plaintiff stated that a defendant claimed by an adverse title, he stated himself out of court. But since that time injunctions have grown in favor, and the rule is greatly relaxed.

In the case of the Merced Mining Co. vs. John C. Fremont, 6 Cal. Rep., April Term, 1857, the Court said, "There is a distinction between the effect of an allegation in the complaint, that the acts were committed under pretense of an adverse title, and the sworn statement (of the fact) in the answer. A man may pretend to claim what he would not solemnly set up in his answer." The court then adds, "The allegation in the complaint that the defendants justified under an adverse claim, will not in any sense prejudice the right to the injunction."

It would be to misapprehend the court, it seems to me, to infer from the language above quoted, that it intended to decide that in no case can a plaintiff, by showing the adverse claim of the defendant, prejudice his right to an injunction. If a plaintiff in possession, with only the presumptive title which his possession creates, alleges in his complaint that the defendant claims adversely, by reason of a valid patent from the sovereign authority, obtained in good faith, would not such an admission prejudice his right to the injunction? It surely would. If the plaintiff in an action shows by his complaint a better title in the defendant than he claims for himself, he can have no injunction. In this cause the plaintiff's title is merely possessory, and the complaint admits the United States patent to J. C. Fremont, but alleges that the patent is fraudulent and void.

This raises an important question: Is it competent for the plaintiff to question the validity of the patent?

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This question was raised in the Supreme Court of the United States in the case of *Field vs. Seabury*, December Term, 1856, in deciding which the court said, "This case involves directly the point whether, where a grant or patent for land, or legislative confirmation of title to land, has been given by the sovereignty or legislative authority, only having the right to make it, without any provision having been made in the patent, or by the law, to inquire into its fairness as between the grantor and grantee, or between third parties, a third party can raise in ejectment the question of fraud, as between the grantor and grantee, and thus look beyond the patent or grant? We are not aware that such a proceeding is permitted in any of the courts of law.

In England a bill in equity lies to set aside letters patent obtained from the King by fraud, and it would in the United States, but it is a question exclusively between the sovereignty making the grant and the grantee."

This clear and deliberate opinion by the highest tribunal in the land upon this very point, must be conclusive. Then if the plaintiff is not permitted to question the validity of the patent, has he not in this complaint shown such an adverse title in the defendants as will preclude him from the aid of an injunction?

The right of the United States to make a grant of land containing gold and silver mines, is questioned. The Supreme Court of this State decided, in the case of *Hicks vs. Bell*, 3 Cal. Rep., 219, that by virtue of her sovereignty, this State is the sole owner of all the mines of gold and silver within her bounds. I question this doctrine, and very much doubt the competency of a State court to finally determine and settle a question of right between the United States and the State. Nor does it appear that the State itself has much faith in her title to the mines. The presumption that she has, is rebutted by the fact that they have never been disposed of, and the proceeds squandered, as was the case with all her other patrimony. The better opinion seems to be that the ownership thereof is in the United States. Hence it appears, that to entitle the plaintiff to the injunction he must show a sufficient title in himself, and that the defendants are without right or title committing waste, or trespass, to the irreparable injury of plaintiff's property.

That in this complaint the plaintiff shows that defendant's claim, un-

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der a patent from the United States, the validity of which the plaintiff is not permitted to question, and which must, therefore, be considered good and perfect. And as the grant of land by the United States carries with it the mines of gold and silver, the conclusion seems irresistible that this is not a proper case for the interposition of that powerful provisional remedy, the order of injunction. It is therefore refused.

HILL vs. BEHRENS.

Sixth Judicial District Court, September, 1857.

DEFAULT—ANSWER.

The plaintiff delaying to take judgment is equivalent to a consent to give the defendant further time to answer.

This is a motion of plaintiff's, for an order directing the clerk to enter the default of the defendant, and judgment against him.

———, for plaintiff.

———, for defendant.

BOTTS, J.—The papers in this case simply show that the summons was served on the 27th day of July, 1857, and that an answer was filed, signed by the defendant himself, on the 28th of August, 1857. It is admitted that the answer was filed before application for default or judgment.

It would perhaps be sufficient to ground the denial of this motion upon the fact, that whilst it, in terms, asks for an order against the clerk, based upon a supposed dereliction of duty that would carry costs, he has had no notice of it. But as the question upon the *ex parte* application has been fully discussed in the brief of the plaintiff's counsel, and as the only effect of the argument has been to satisfy me that the motion should have been denied, even if regularly made, I may as well take this occasion to dispose of this question of practice.

The authorities referred to are all from the State of New York, and

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turn upon the construction of the peculiar provision of the code of that State. The 121st section of that code says that the answer must be served within twenty days after the service of a copy of the complaint, and the 201st section provides that judgment for the plaintiff may be had if the defendant fails to answer the complaint within that time.

Under these provisions it was held, in *Foster vs. Udell*, 2 Code Reporter, p. 30, that the defendant might answer at any time before the entry of the judgment, and I must confess that this seems to be the more liberal and reasonable construction of the statute. As Judge Daly remarks, the plaintiff delaying to take judgment is equivalent to a consent to give the defendant further time to answer.

A different conclusion was afterwards arrived at in *Dudly vs. Hubbard*, 2 Code Rep., 70. Edwards, J., declares that the defendant has twenty days to answer, and no more. But he says, "there is now no entry of default, it is entered by operation of the statute."

So in *Mandeville vs. Winne*, 1 Code Reports, N. S., 162, Parker, J., in deciding that the defendant is restricted to the twenty days, says, "No default is required to be entered at the expiration of that time, as was formerly the practice. If a rule for default was to be entered, it would probably be best to regard the time for answering as extending to the entry of the rule, and to hold the taking of the default as the evidence of the plaintiff's intention to terminate the time for answering."

Now it is only necessary to say that, by our practice act (see section 150) the default of the defendant is to be entered upon the application of the plaintiff, before he can have judgment, to show that the very authorities quoted by the learned counsel to sustain his motion, are directly against him.

Motion overruled.

SUNDERLAND vs. GRIFFITH.

Sixth Judicial District Court, September, 1857.

CONVEYANCE—HOMESTEAD.

Where A gives a deed to B, as a mortgage, and the terms of the mortgage are satisfied, and B gives a deed back to A, this second deed will be considered as a simple release of the mortgage.

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The character of a homestead having by residence been once possessed upon a piece of property, no act of the husband alone can deprive the wife of the interest she has thereby acquired.

Sunderland, for plaintiffs.

Clarke & Gass, for defendant.

BOTTS, J.—The complaint in this case is a bill addressed to the equity side of the court, whilst the facts authorise only a complaint in ejectment. The difficulty is this, that whilst the plaintiff prays for certain equitable relief to which he is not entitled, because there is no need of it, he also asks in effect, though very inartificially, for a judgment which would be executed by a writ of *habere facias possessionem*. In such a case the defendant could waive a jury, and perhaps, by arguing and submitting the question to the court, he has virtually done so. Such is the inextricable confusion into which a departure from the great landmarks of the English system of special pleading, and the amalgamation of law and chancery, have led us.

In obedience, then, to the spirit and meaning of our practice act, as near as I can ascertain it, I have concluded to treat this as an action of ejectment, in which a jury has been waived, and the case has been submitted to the judgment of the court.

Upon this basis I proceed, and to my mind the evidence establishes the following facts:

On the 4th day of December, 1852, the defendant, Charles Griffith, being indebted to one Caleb Gosling, executed to the said Gosling a deed of the premises described in the complaint. This deed, although absolute on its face, was intended as a mortgage, to secure the payment of the money due from the defendant to Caleb Gosling. In this deed the wife of Griffith joined. On the 21st day of March, 1853, Caleb Gosling conveyed this property to Mary Ann Griffith, the wife of the defendant. This conveyance was made at the request of the defendant, and with the understanding that the property was to be remortgaged to the said Caleb Gosling, after the execution of a mortgage to one Kelly. On the 23d of March, 1853, a mortgage upon this same property to secure the payment of four thousand dollars, justly due him, was executed to Caleb Gosling by Griffith and wife.

On the 20th day of May, 1854, this mortgage was satisfied, and a release entered by Caleb Gosling.

On the 23d day of October, 1854, one Joseph Gosling recovered judgment in the District Court of the Sixth Judicial District, against this defendant, Charles Griffith. On the 15th November, 1854, execution issued on this judgment, and was levied upon this property. On or about the 15th of December, 1854, the property was sold by the sheriff under, and by virtue of the levy aforesaid. At this sale the plaintiff in this action became the purchaser. He was the attorney of the plaintiff in the suit in which the judgment was obtained, under which the property was sold. At and before the sale, notice was given to the purchaser and the sheriff of the defendant's claim of a homestead. On the 15th day of June, 1855, the sheriff, (six months having expired without any offer of redemption,) conveyed the property to the plaintiff in this action. Some months after this, the judgment in *Gosling vs. Griffith* was fully satisfied.

As to the homestead in point of fact, I find that the property in controversy, at the time of the sale was worth about five thousand dollars; that Griffith and his wife lived on it, occupying it as a confectionery and lodging house up to November 2d, 1852, when the house was destroyed by fire; that Griffith and his wife then removed to a farm owned by him, on which he had built a dwelling house, about six miles below the city of Sacramento; that for some time they entertained the intention of returning to the city property, which had been rebuilt in a manner calculated to carry on the old business, but that they finally abandoned this intention, and the property was rented to one Sands, who occupied it for about eighteen months from March, 1853. It is alleged in the complaint, and not denied in the answer, that the defendants are in possession of the property.

The defendants now set up their claim of a homestead, in answer to the plaintiff's demand.

It is contended by the plaintiff that the deed from Griffith and wife to Caleb Gosling, and the reconveyance from Gosling to the defendant, Mary Ann Griffith, were fraudulent, and prays that they may be ordered to be delivered up and canceled. There is nothing in the testimony that warrants such a conclusion. The defendant, Charles Griffith, being justly indebted to Caleb Gosling, and being in solvent cir-

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cumstances, conveyed the property in controversy to Gosling, by a deed, absolute in its terms, it is true, but one which was intended as a mortgage, and which would be treated as a mortgage, either by a court of law or a court of equity. Gosling, it appears, having confidence in the integrity and ability of the defendant, consented to release his mortgage, that a preference might be given to Kelly. To perfect this arrangement, Gosling conveys to the defendant, Mary Ann Griffith. Now what had he to convey? In truth, according to the modern doctrine, he had no estate in the land; he had only a security for the debt due from Griffith. All that the plaintiff can ask, then, is that this deed from Gosling to Griffith's wife be considered as that for which it was intended, viz: a release of the mortgage to Gosling. It shall be so considered. What then? The property is again in Griffith, free from incumbrance. Now he, his wife joining, mortgages it honestly and *bona fide* to Kelly and Gosling. The debt to Gosling is discharged, and the mortgage released. Then Jos. Gosling obtains a judgment against Griffith, levies it upon the property, and sells it under his execution. The plaintiff becomes the purchaser, and now sues upon his sheriff's deed.

Thus considered, the case presents the single question, had there been such a dedication of this property as to consecrate it as a homestead for the defendants? I think this character had been stamped upon it. They lived upon it and made it their home up to the time of the fire, in November, 1852. The Supreme Court has declared that residence is the test of dedication. See *Cook vs. McChristian*, 4 Cal. R., 23; *Taylor vs. Hargous*, 4 Cal. R., 268, and *Reynolds vs. Pixley*, 6 Cal., April T. It is true that the defendant, Griffith, although he rebuilt the house after the fire, never again made it his residence, but the Supreme Court has decided that the character of a homestead, having by residence been once possessed upon a piece of property, no act of the husband alone can deprive the wife of the interest she has thereby acquired. This interest can only be destroyed by the deed of the wife, made under the sanction of a privy examination. See *Taylor vs. Hargous*, and *Revalk vs. Kramer*; 7 Cal., July T.

Holding this property, as I am prepared to do, as the homestead of the defendants, it becomes unnecessary, as far as the merits of the controversy are concerned, to pass upon another question raised by the

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defendants. As a general rule I am satisfied to confine my decision to a point that will settle the issue made by the pleadings. But, in this case, it is due to the plaintiff that the point raised by the defendants should be passed on. They contend that the plaintiff, having been the attorney of the judgment creditor in the prosecution of the suit under which he purchased, his purchase is fraudulent and void. As to actual fraud upon the part of the plaintiff, there is not the slightest ground for the charge. Nor did the defendant probably intend to make it. Neither do they state the rule properly on this subject. No trustee or agent can retain the benefit of a purchase at a sale made under his direction, against the will of his principal. This would be, to be the seller and purchaser too. His principal can have the sale annulled, or he can affirm it, at his option. Gosling, the creditor, seems to have been perfectly satisfied with the conduct of his attorney, and he is responsible to nobody else.

Under the facts of this case, I find, as matter of law, that the defendants are entitled to judgment. Let judgment be entered accordingly.

HEREFORD vs. SACRAMENTO COUNTY.

Sixth Judicial District, September 1857.

DISTRICT ATTORNEY'S FEES.

The fees of a District Attorney, allowed by statute upon conviction, are not a county charge by law, when they cannot be collected of the defendant.

Hereford, for plaintiff.

_____, for defendant.

BOTTS, J.—This case is submitted upon an agreed statement of facts, from which it appears that the plaintiff claims of the defendant the sum of two thousand one hundred dollars, for one hundred and forty convictions for misdemeanor, prosecuted in the Recorder's Court of the city of Sacramento, upon which execution has issued against the con-

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victs with return of *nulla bona*. These convictions were had between the 9th of October, 1855, and the 21st of March, 1855.

The plaintiff, who it is admitted was, and is, the District Attorney for the county of Sacramento, claims that he is entitled to a fee of fifteen dollars upon each of these convictions, and alleges that such fees are made by law, a county charge. Upon him devolves the burden of establishing his claim.

I have examined carefully the statutes supposed to sustain the plaintiff's demand against the county, without being able to find in them any thing to support the charge.

Part VII, of the "Act to regulate proceedings in criminal cases," (see Comp. Laws, p. 7,) fixes the fees of Peace Officers, Sheriffs, Jurors, Justices, and District Attorneys. Section 694, makes all these fees, except those of District Attorneys, which seem to be admitted *ex industria*, when they cannot be collected of the defendant, a county charge.

That the fees of the District Attorney are intentionally excepted from the operation of this section, is an inference greatly strengthened by an examination of the next section. Section 695, provides for the refunding to the County Treasury of these fees by all salaried officers, except District Attorneys. The legitimate conclusion is, that this class is exempted from the general rule, because their fees alone are not guaranteed by the county. In other words, that the county guarantees these fees to no salaried officer.

Again, the first section of the Act concerning Salaries, (see Comp. Laws, p. 873,) provides expressly that the *salary* of District Attorneys shall be paid out of county funds, carefully omitting to make the same provision for his perquisites.

The other statutes cited in the brief of the plaintiff, throw no light upon the subject, and I think it must be admitted that those commented on, if they do not ignore the plaintiff's claim, do not suffice to establish it.

I lay no stress upon the fact that the Legislature afterwards passed a law making, for the future, these fees a county charge.

Upon the facts agreed, I find, as matter of law, that the defendant is entitled to judgment.

Let the judgment be entered accordingly.

Carr vs. Van Canegheim.

CARR vs. VAN CANEGHEIM.

Third Judicial District Court, July 1857.

FEES—SHERIFF'S COMMISSIONS.

The sheriff is not entitled to commissions upon the amount of an execution, unless the money shall actually be recovered by him.

Where the parties compromise, and the execution is settled, and no money passes through the hands of the sheriff, he should not be allowed commissions.

The question submitted to the court is, whether the sheriff is entitled to his commissions when he has levied upon property without sale and without collecting the money, the parties having compromised the claim.

The facts are, that an execution was placed in the hands of the sheriff to make the amount of the judgment in the case, and by him levied on real property of the defendants.

The parties afterwards compromised the claim, and the defendant paid to the plaintiff the amount agreed upon by the compromise, without any agency on the part of the sheriff except as aforesaid.

_____, for plaintiff.

_____, for defendant.

HESTER, J.—Held that the common law gave no fees to the sheriff. 13 Vin. Abr., 144.

The statute of Elizabeth provides, "that it shall not be lawful for any sheriff to take of any person for *serving* an execution more than, &c.;" under this statute it has been uniformly held in England that the sheriff is entitled to his poundage by the service of the execution. 5 Term Rep., 470; Strange, 1262.

The statute of New York gave poundage to the sheriff for *serving* an execution, to be taken from the sum *levied*. A former statute of that State was for *collecting*, &c. The courts there decided that the two statutes meant the same; and that the sheriff was entitled to his poundage by the service of the execution, although the claim was compromised: 13 John. R., 378; 5 John. Rep., 252; 9 Wend. 437; 17 Wend. 14; 1 Gain. R., 192; 2 Con., 421.

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But by these statutes there was no provision allowing compensation for each official act of the officer upon an execution, as by the statute of this State. The 29th section of the act regulating fees, (Statutes 1855, p. 90,) provides that a sheriff shall be entitled to the following compensation, viz: For levying an execution, \$2; for traveling in making the levy, 50 cents per mile; for advertising, \$3; for making sheriff's deed, \$5; for commission for *receiving and paying over* money on execution, &c. These items of compensation, together with others contained in that and other sections, show that the legislature never intended he should be entitled to his commissions where he had not received the money. By the English and one of the New York statutes, sheriff's poundage arose by the service of the execution. By the California statute, the commission originates by *receiving* the money, &c.; the phraseology being essentially different, a different decision is required. Therefore, in the case presented, the sheriff is not entitled to his commission. This view is also aided by the 51st section of the same act.

IN RE. BE HOE.

Sixth Judicial District Court, September 1857.

ILLEGAL ARREST.

The failure to specify definitely and precisely the charge upon which the defendant is held to answer on arrest, is fatal.

_____, for petitioner.

_____, contra.

BOTTS., J.—It appears from the return to the writ, that the defendant is held in custody by one Nathan Coon, a policeman, by virtue of a certain warrant of attachment issuing out of the County Court of the county of San Francisco, directed to the sheriff of Sacramento, attested by the clerk of the county of San Francisco.

By said writ of attachment, the said sheriff of Sacramento is commanded to apprehend and attach the body of the defendant, to answer

In re. Be Hoe.—McKune vs. McGarvey.

for evading the service of a certain writ of *habeas corpus*, or refusing to obey the same. There is no recital in the writ of any probable cause, supported by oath or affirmation.

The failure to specify definitely and precisely the charge which the defendant is held to answer, and the want of probable cause, supported by oath or affirmation, are defects in the process which would have been held fatal at any time these hundred years. The 19th section of the Bill of Rights embodies this ancient principle of the English law.

The detention of the defendant is, therefore, illegal, and she must be discharged from custody.

Ordered accordingly.

McKUNE vs. McGARVEY.

Sixth Judicial District Court, September 1857.

FEME SOLE TRADER.—MORTGAGE.

A feme sole trader can alone execute a valid mortgage upon property acquired by her subsequent to the day of recording her declared intention to become benefited by the act, if such property was necessary to carry on the business which she selects.

_____, for plaintiff.

_____, for defendant.

BORRIS, J.—The plaintiff is the assignee of a note and mortgage upon which he sues, praying a decree of foreclosure and a personal judgment. The defendant, for McGarvey alone defends, pleads her coverture.

I find the following facts: On the 18th day of October, 1854, the defendants, being both married women, declared their intention of becoming sole traders in the business of "farming and stock raising." On the same day, they purchased the premises in controversy, and executed the note and mortgage declared on, to secure a part of the purchase money. The declaration was not recorded or published till the next day.

At common law, a note executed by a married woman was absolutely

void. She could be the recipient of a conveyance, but she could only convey, anciently, by fine and recovery, and latterly by deed in which the husband united. Under certain conditions, our statute concerning sole traders removes this disability. Were those conditions complied with by the defendant at the time of the delivery of the note and mortgage?

The provisions of the statute are, at first view, contradictory and inconsistent. The second section provides that, from the date of the declaration before a Notary Public, she shall be individually responsible in her own name for all debts contracted by her on account of her said trade or business. On the other hand, the third section declares that after the declaration has been duly made and "*and recorded,*" such *feme covert* shall be subject to all the liabilities provided now, or hereafter to be provided by law against debtors and creditors. The only mode of reconciling these apparently discordant sections, is to hold, as I do, that under the second section she is made *liable* by the act of declaration, and that the third section is intended to secure her the fruits of the investment, provided she has *recorded* as well as *declared*.

Hence, I hold, as a matter of law, that on the 18th of November, 1854, the defendant was as capable of executing a note and mortgage as if she had been a *feme sole*.

It is claimed on the part of the defense, that the purchase of real estate is not included in the specification of the business of "farming and stock raising." I cannot permit my private objections to this statute to warp the general rules of construction, and under the operation of those rules, I cannot but think that the specification is large enough to cover the transaction. If the declarant is authorized to carry on the business specified in the declaration, she must be allowed to become the purchaser, even when she might be the hirer, of the things usual and necessary to the business she is authorised to conduct.

As matter of law, I find that the plaintiff is entitled to the relief he prays for.

Let the counsel draw the decree accordingly.

Rush vs. Johnston.

RUSH vs. JOHNSTON.

Third Judicial District Court, July 1857.

VOIDABLE SALE.

Where all the stockholders are not present at a sale of the corporation property, when such sale is for the advantage and benefit of the absent stockholders, they are presumed to have knowledge of it, after a sufficient lapse of time.

A delay of three years, in inquiring into the validity of such sale, will be construed into an implied acquiescence therein.

Where the absent stockholders stand by and see another, who has purchased without fraud or collusion, the corporation property, improve the same for a long time without making known their adverse claim, they will not be permitted to assert it.

The main object of this suit is to obtain a decree that the defendants account, for the benefit of the plaintiffs.

In Sept., 1852, the Santa Clara Steam Mill Company was organized, the stock of which consisted of 300 shares at \$100 per share. The plaintiffs, the defendants, (except the corporation,) and others, were shareholders. Their mill was erected for the manufacture of flour, and was in operation by the first of Jan., 1853, and, with some exceptions, continued running till the 9th of April thereafter, when it was ascertained that only \$16,000 had been paid on the shares, that the income of the mill was \$9,000, that the expenses were \$33,000,—leaving a balance against the Company of \$8,000; and that the stockholders were not only unwilling to contribute to relieve the company from its indebtedness, but were opposed to incurring the necessary expenses of repairing the mill. One of the creditors had recovered a judgment against the corporation for upwards of \$300, in a Justice's Court, and had levied an execution upon the mill and the lot upon which it was erected. The stockholders held various public meetings at which many of them attended, including some of the plaintiffs. Johnston (one of the defendants,) proposed that he and as many as would join with him would purchase said mill and lot, at the sale upon said execution, and pay the debts of said company, provided they should have the corporation property. The stockholders who attended said meetings, consented to the proposition. The facts proved, show that the shareholders were to be discharged from further payment on their shares. The

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defendants accordingly made the purchase on said 9th day of April, at the officer's sale, paid the debts, and afterwards expended about \$20,000 in improving said mill. Those of the plaintiffs who were not present at said arrangement, were cognizant thereof, and of the making of said improvement without making any objection or asserting claim to the mill, or their stock. The corporation owned no other property. As soon as said improvement was made, the mill commenced running and has since done a fair business. The plaintiffs were silent as to their claim until sometime in 1856, after the Supreme Court had decided that a Justice of the Peace had no jurisdiction beyond \$200.

The plaintiffs contend that, as the Justice had no jurisdiction of the suit, the judgment, execution and sale were void, and did not pass the title to the defendants; that the same remained in the corporation, of which they (the plaintiffs,) were stockholders; that the defendants should account to the corporation, and that the plaintiffs should have their proportion of the profits accruing after said sale.

The main question presented is: Have the plaintiffs established sufficient equity to induce a court of chancery to decree an account? From the proof, no fraud can be charged upon the defendants—the transaction was public, open and fair, and seemed to be the only practical mode of relief to the corporation from its embarrassments. Since said sale there has been no corporate action.

Pratt, and Redman, and Younger, for plaintiff.

Wallace, and Voories & Archer, for defendants.

HESTER, J.—Held that although the plaintiffs were not present at the time of the acceptance of Johnston's proposition, and the sale of the property, yet they are presumed to have knowledge thereof, and of the payment of the debt, and of the improvement of the mill, as they had ample opportunity of acquiring such knowledge: the law being, that a person is presumed to know what by reasonable diligence he could have ascertained. 7 Blackford, 329.

It was also held, that proof of a mere legal right is insufficient to maintain this action, which is based upon certain equities alleged in the complaint. The two are separable. They may or may not unite in the same person. To induce the action of a chancellor, the equitable

Dana vs. Stanford.

right must be established. For upwards of three years, the plaintiffs treated their stock and the mill as abandoned, and yielded up to the defendants; and the corporation as having no existence—acquiescing in their claim. Such a course of action of the plaintiffs, would be a fraud upon the defendants if they were permitted, after a lapse of so much time and the expenditure of money in refitting the mill and the payment of the corporation debts, to assert their claim in a court of Chancery. To say the least of it, it destroys their equity for a recovery.

The law is well settled, that where a man suffers another to expend money upon land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to assert it. It is a kind of equitable estoppel. 12 Mo. R., 339; 4 John. Ch. R., 91.

A fulfilment of the contract on the part of the defendants, creates an equity in their favor which should control the conscience of a Chancellor. Such a contract, uncontaminated with fraud, and a submission thereto by the party realizing its benefits, ought not to be disturbed in a court of equity; but the parties should be left to whatever remedy they may have in a court of law.

An account therefore, should not be decreed, and the bill should be dismissed.

LYON vs. CHAPPELLE.*

Fourth Judicial District Court, September, 1857.

ATTACHMENT UNDERTAKINGS—ACTION ON DAMAGES.

In an action against the sureties on an undertaking, given upon the issuing of an attachment, the proof of damages should be limited to the costs and expenses incurred, and such actual damages as are the natural and proximate results of the authoritative acts done under the writ, sustained by being deprived of the use of property, or from its loss, deterioration, or destruction.

Damages, in consequence of injury to credit and reputation are not liabilities imposed upon the sureties, and such proof is inadmissible.

B. S. Brooks, for Plaintiff.

Janes, Lake & Boyd, for Defendant.

On motion for a new trial.

* See ante p. 111.

Lyon vs. Chappelle.

HAGER, J.—The action is upon a statutory undertaking, given by the defendant, in a suit against these plaintiffs upon obtaining a writ of attachment against their property, in which, upon a discontinuance, judgment was entered in favor of these plaintiffs.

In support of this motion, the only ground relied upon is error, in refusing to allow plaintiffs to prove, as damages, injury to their credit and reputation as merchants, by reason of the attachment and levy.

In specified cases our practice act (§120) provides that the plaintiff, in an action, may have the property of defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment. Upon issuing the writ, the plaintiff in the action is required (§122) to give an undertaking in a sum to be fixed in each case, with sureties, to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. The attachment is not executed if the defendant gives an undertaking, with sureties, in an amount sufficient to satisfy the plaintiff's demands and costs (§123).

These statutes are remedial in their character, and any party, whether or no it be necessary to secure his debt, if he thinks fit, may avail himself of their provisions; and although, sometimes they may operate with great hardship and oppression, yet, in expounding them, if the object and intent of the Legislature is clear, it is the duty of the court to advance and sustain them.

If the attachment is procured in good faith, and a party only avails himself of such remedy as the law allows, he and his sureties can only be held answerable upon the undertaking, however great may be the damages to the credit and reputation of the defendant in the suit, to the extent of the liability imposed by, and for such as are embraced in, the condition of the undertaking. The defendant may always prevent the levying the writ by giving the undertaking specified in (§123), in which case no other damages will follow, except such as result from an ordinary suit.

If he does not do this, and recovers judgment, he can sue upon plaintiff's undertaking and recover all damages sustained by reason of the attachment.

Lyon vs. Chappelle—Hensley vs. Tarpey.

In estimating these, the question is presented, should the proofs of plaintiff be confined to the costs and expenses incurred, and such actual damages as are the natural and proximate results of the authoritative acts done under the writ—to wit: such as necessarily result from the asportation, loss or destruction of the plaintiff's property, or his being deprived of its use; or should he be permitted to show that his credit has been impaired, and his reputation as a merchant injured, in consequence of the issuing and levying this attachment? It is hardly reasonable to suppose that the Legislature would grant a remedy with the view or intent of creating speculative liabilities against sureties required to be given in order to pursue that remedy. It is more reasonable to suppose that, in authorising this extraordinary remedy, surety was required to be given to protect and indemnify the defendant in attachment against legal acts done by authority of, and in command of, the writ.

Beyond these, it might be said, if the officer exceeds his duty, the remedy is against him: if the suit and attachment were malicious and without probable cause, in addition to prosecuting the undertaking, an action for malicious prosecution might be instituted, and damages could be claimed and recovered co-extensive with the injury, and as are peculiar to such actions; but, by no analogies of the law can it be inferred, that the Legislature intended to impose such liabilities upon the sureties, or any other, except such as are the natural, necessary and proximate results of the legal execution of the writ. (See 8 B.¹ Monroe, 51 and 160.) The proofs as to damages in those cases, besides costs and expenses, should be confined to the loss or injury sustained by being deprived of the use of property, or the loss, destruction, or deterioration of the property itself. New trial denied.

HENSLEY vs. TARPEY.

Third Judicial District Court, July, 1857.

TRESPASS—INJUNCTION.

An injunction will lie to restrain trespass in removing stones or other material from a quarry, where the averment shows that the substance of the realty is being destroyed besides the irreparable mischief.

Hensley vs. Tarpey.

The courts have no power, in an ordinary action, to adjudicate upon the question of title, where the act necessary to be performed is a political act, and could not be performed by the judiciary.

The object of this suit is for an injunction to restrain the defendant removing from the quarry of the plaintiff's, lime rock ; and cutting down and removing timber trees, growing upon the land of the plaintiff's.

The proof shows that the plaintiff's claim is under a Mexican grant, with indefinite boundary, to ascertain and define which the action of the general government was necessary. The claim has been confirmed, and no appeal pending. The United States Surveyor, for the District of California, has caused the land to be surveyed, which, as surveyed, is the land in controversy. No further action has been taken by the general government. The defendant settled upon the land as public land, with a view of obtaining a pre-emption therefor.

The defendant contends, 1st. Admitting that the plaintiffs are the owners of the land, still they are not entitled to an injunction, the complaint and proof showing a mere trespass. 2d. They have no title to the land on which the trespasses were committed.

Peckham & Wallace, for plaintiff.

Wilson, for defendant.

HESTER, J.—Held that as to the first point made by the defendant, if the complaint contained nothing more than the general allegation of “irreparable injury,” it would not be sufficient. 2 Cal. Rep., 469. It, however, shows otherwise.

Courts in England were for a long time extremely strict in confining the relief in equity to cases of tenancy, founding their interference in restraint of waste, on the privity of title between the parties. Finally, the rigor of the ancient rule was relaxed upon the avowed principle of enjoining in matters of trespass where irreparable injury resulted from the acts complained of ; and upon the relaxation of the principle, Lord Eldon granted an injunction to restrain a trespasser from digging coal upon the premises of another. *Mitchel vs. Does*, 6 Ves., 147 ; 7 Ves., 307. In these cases the injury was peculiar and especial ; the injunction was sustained on the ground of irreparable mischief,

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and that the ruin of the property, as a mine, would be the consequence. So taking stones from a quarry. 18 Ves., 184. In these cases the mischief reaches to the substance and value of the estate, and goes to the destruction of it, in the character in which it is enjoyed. So where there is a permanent appropriation of the land. *Agar vs. The Regent's Canal Company*, Cooper's Eq. R., 77. It is not sufficient that the act be simply *per se* a trespass, but it must be a case of irreparable ruin to the property, in the character in which it has been enjoyed or intended to be used. In the case of *Thomas vs. Oakly*, 18 Ves., 184, Lord Eldon remarked, "The interference of the court is to prevent you removing that which is his estate;" and he asks the question, "why is it not equally to be applied to a quarry?"

In the case of *Kane vs. Vandenburg*, 1 John. Chan. Rep., 12, the court says, on the subject of injunction, "that it is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on latitude of discretion in the court."

Story, in his work on Equity Jurisprudence, says, "formerly courts were reluctant to interfere by injunction, even in cases of repeated trespass; but now courts have not the slightest hesitation, if the acts threatened to property would be ruinous or irreparable, or impair the just enjoyment of property in the future." 2 Story, sec. 928. He also says, "it will lie for trespass for digging into mines; so where a dispute exists about the boundaries of estates, and one of the claimants is about to cut down timber trees on the disputed territory. In short, it is now granted in all cases of timber, coals, ores, and quarries, where the party is a mere trespasser on the land of the owner, the acts being an irreparable damage to the particular species of property." *Ib.*, sec. 929.

In the case at bar, the cutting down and destroying timber trees, and appropriating rocks of the quarry to the defendant's use, are acts reaching to, and affecting the substance and value of the estate. Therefore as regards the character of the supposed trespass an injunction will lie.

Secondly.—As to the second point assumed by the defendant, it was held that the grant of land was with an uncertain boundary. There was no segregation from the public domain by Mexican authority. That for the purpose of such segregation the exercise of political

Hensley vs. Tarpey—Vertimer vs. Reichard.

power on the part of the United States was necessary. It is in the category of imperfect grants, and not sufficient to maintain an action of ejectment, as the full exercise of sovereign power on the part of the United States has not yet been obtained.

In the case of West vs. Cochran, 17 How., 403, it is decided that courts have no jurisdiction to deal with imperfect claims to public land, either as to fixing the boundary by survey, or for any other purpose. It was competent for Congress to provide, that before a patent issued, the exact limits of possession should be ascertained. See also Burges vs. Gray, 16 How., 48; 13, p. 498; United States vs. King et als., 3 How., 773; Hickey vs. Stewart et als., 3 How., 750. In the case of Lease et als. vs. Clark, 3 Cal. Rep., 17, the Supreme Court recognized the principle that all acts necessary to divest the sovereign of title, were political acts, and could not be performed by the judiciary; and where the whole of such acts had not been performed, the title had no standing in an ordinary tribunal.

These authorities show that this court, has no power, in an ordinary action, to adjudicate upon the question of title involved in this case. But as the extraordinary remedy by injunction is resorted to by the plaintiffs to prevent an injury to the land claimed by them, though their title is not yet, but in process of being completed; and as the real question between the parties being rather of boundary than otherwise, I am inclined to continue the injunction, especially as the plaintiff's bond will protect the defendant from any injury he may sustain, if it should turn out that the plaintiffs have no right to the land in dispute. This view is sustained by the case of Buckelew vs. Estill, 5 Cal. Rep., 108.

The injunction heretofore granted is therefore continued.

VERTIMER vs. REICHARD.

Sixth Judicial District Court, Sept., 1857.

STATUTE OF LIMITATIONS.

Where the last day allowed by the statute for bringing the action falls upon Sunday, the action must be commenced upon the preceding day, and not on the day after.

The names of counsel have not been furnished.

Vertimer vs. Reichard—Boyd vs. Williston.

BOTTS, J.—This is an action brought upon an open account for goods, wares, and merchandise. The defendant pleads that no part of the cause of action occurred within one year from the commencement of the suit.

The complaint alleges that the last item in the account bears date January 18, 1856, and it is admitted that the complaint was filed January 19, 1857.

The statute is imperative in requiring such an action to be commenced within a year. In reckoning time from an event, here it is reckoned from the delivery of the last item, the day of the event is to be computed. The People vs. Clark, 1 Cal. Rep., 407. As to the fact urged by the plaintiff's counsel, that the 18th of January, 1857, fell on Sunday, the authority cited (note to 2d Hill, 377) is directly against him.

BOYD vs. WILLISTON.

Twelfth Judicial District Court, August, 1857.

PAROL EVIDENCE—ENDORSEMENT.

The holder of a promissory note, taking it after it became due, from the first endorser, cannot maintain an action upon it against a second endorser, whose name is on it. Parol evidence is inadmissible in an action on the note, to prove any intention of the parties contrary to the legal effect of the instrument.

This was an action against defendant as endorser on a promissory note for \$600, dated May 1st, 1856. The facts are that one Bonestell, being indebted to John Flint, proposed to give his promissory note, endorsed by Williston. The note was accordingly given, and endorsed by Williston, but by inadvertance, as alleged, was made payable to the order of Flint instead of Williston, and was endorsed by Flint first and Williston afterwards. After the note became due it was transferred by Flint to plaintiff.

An effort was made on the trial to explain the instrument, and to show that it was given to Flint in satisfaction of a debt, and that he did not endorse it in the regular commercial manner.

This evidence was ruled out.

Boyd vs. Williston.—Lind vs. Heath.

James, Lake & Boyd, for plaintiff.

Waller & Osborne, for defendant.

NORTON, J., held that Flint was the first endorser, and could not, therefore, maintain an action on the note against Williston, who was the second endorser. The plaintiff, taking the note after it became due, was in no better position than Flint. Parol evidence is not admissible, in an action on the note, to prove that Williston intended to become first endorser.

Judgment for defendant.

LIND vs. HEATH.

Twelfth Judicial District Court, August, 1857.

INSOLVENCY—DESCRIPTION IN SCHEDULE.

If an instrument, drawn as a bill of exchange, and accepted, is described in the schedule as a promissory note, and the parties properly referred to, it will be sufficient, though the holder may be unknown to the insolvent.

The plaintiff sues the defendant upon a certain acceptance of a bill of exchange, and the defendant pleads as a bar to the recovery, his discharge in insolvency, in the schedule of which this accepted bill is recited as a promissory note to the defendant, which he has endorsed as surety for the maker, who is really the drawer of the bill of exchange.

Thus far the parties occupy the same relative position. The plaintiff claims that it is not a sufficient description to warrant the discharge.

Waller & Osborne, for plaintiff.

Brosnan, for defendant.

NORTON, J., held that in this case the description was sufficient, and that the plaintiff could understand that the debt therein described referred to the acceptance, though described as an endorsement.

Judson vs. Atwill.

JUDSON vs. ATWILL.

Twelfth Judicial District Court, August, 1857.

INSOLVENCY—SCHEDULES.

An insolvent omitting to state in the schedule that a creditor's name was unknown, and incorrectly describing the notes as payable to another person, is such an omission as will not bar the recovery of the debt after the insolvent has been discharged.

The facts in this case were as follows: On the 24th day of October, 1854, defendant made his four several promissory notes, payable to the "order of E. Judson," each for the sum of three hundred dollars, maturing at six, twelve, eighteen, and twenty-four months after date, respectively, and delivered the same to one *Farmer*, who, as the plaintiff's agent, negotiated the loan. These notes were given, however, in lieu of others endorsed by H. Meiggs, which last were given for money loaned by Farmer, as plaintiff's agent, and which were delivered up to be canceled when the new notes were given. This arrangement was made at the solicitation of defendant, he representing that he could not meet his liabilities without an extension of time.

Soon after the notes sued on were given, defendant sold out to one Douglass, all his stock in trade, and filed his petition in the Fourth Judicial District Court, for the benefit of the Insolvent Debtor's Act. In September, 1855, by decree of said court, he was discharged from all his debts and liabilities, and he set up that discharge as a defense to this action. But it appears that neither the notes upon which this action is brought, nor the original indebtedness in consideration of which they were given, were described properly in defendant's schedule. Four notes of the like date, tenor, and effect were mentioned, but were described as payable "to *Mr. Farnum*," not even giving the name correctly.

Defendant called Farmer, the agent, as a witness, for the purpose of showing that defendant did not know, at the time of filing his schedule, who was the payee, or owner of the notes. His testimony tended rather to show a contrary state of facts, it appearing amongst other things that the notes were filled up, and the plaintiff's name inserted as the payee by the defendant himself.

Judson *vs.* Atwill.—Bagley *vs.* Eaton, Adm.

Love & Provines, for plaintiff.

Janes, Lake & Boyd, for defendant.

NORTON, J., instructed the jury that, although they should believe from the testimony, that the defendant, at the time of filing his schedule, did not know the name of the payee, or holder of the notes, yet, having omitted to state that the creditor's name was unknown, and having incorrectly described the notes as payable to another person, the decree in the insolvency proceedings did not operate so as to discharge defendant from his liability on the notes, and that the plaintiff was entitled to recover.

Verdict was accordingly rendered for plaintiff.

BAGLEY *vs.* EATON, ADM.*

Fourth Judicial District Court, September, 1857.

LOST NOTE—AFFIDAVITS—EVIDENCE.

Affidavits as evidence of the loss or destruction of a note are received upon the ground that they are preliminary and incidental, addressed solely to the court and not affecting the issue to be tried by the jury.

Where the foundation for the introduction of secondary evidence to prove the contents of a lost note, is laid by the introduction of the affidavits of interested parties, the case must be proven before the jury by primary or secondary testimony, as fully as if the affidavits had not been introduced.

When the affidavits disclose that the plaintiff deliberately and voluntarily destroyed the note, he must, by affirmative testimony, give some explanation of the act, consistent with an honest or justifiable purpose, to rebut the inference of its extinguishment: without any explanation he cannot recover.

The facts are fully stated in the opinion. On motion for a new trial.

Hoge & Wilson, for plaintiff.

Glassell & Leigh, for defendant.

HAGER, J.—The action is against the administrators of the estate of G. C. McMickle, deceased, to recover the amount of three promissory notes, alleged to have been made by deceased, March 22d, 1851,

* See ante p. 185.

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to the firm of Bagley & Sinton. This motion is principally based on the ground that the court erred in charging the jury.

On the trial, in order to account for the non production of the notes, and to lay the foundation for introducing secondary evidence of their contents, the plaintiff read to the court his own and his co-payee, Sinton's, affidavit, in which they substantially depose to the making of the notes, and that they remained in the possession of Bagley & Sinton until after maturity, when, upon the solicitation of McMickle, the affiants consented that they might be destroyed, in order to satisfy him that they would not be negotiated or passed into the market, or the hands of some other party, and that they were then, about the fifteenth of August, 1852, torn up and destroyed, with the consent, and in the presence of, Bagley & Sinton.

The plaintiff then gave in evidence a bond, of March 22d, 1851, from Bagley & Sinton to McMickle, in which it is recited to the effect that on or about the first of May, 1850, Bagley & Sinton sold to McMickle, for the sum of \$14,000, a lot of ground, which is described, and that McMickle paid of the amount the sum of \$8,420, leaving a balance due, which, with the interest, amounted to \$6,580, for which McM. executed three notes of the same date as the bond, "one being for the sum of \$2,000, payable thirty days after date; another for a like sum of \$2,000, payable sixty days after date, and the third and last for the sum of \$2,580, payable ninety days after date, each and all bearing interest at the rate of five per cent. per month from date," and followed by a condition to the effect, that if McM. well and truly pays the notes at maturity, then B. & S. are to execute a deed to McM. for the lot of ground; and if McM. makes default in the payment of any one or all of the said notes, then he is to forfeit all right or interest in the lot, and B. & S. are authorised to dispose of it, discharged of all claim or pretense of claim, or interest of McM., as they may see fit.

It is alleged in the complaint, and not denied, that McMickle died in —, 1854, and it was proven that Bagley & Sinton, on the fifth day of January, 1855, presented to one of the administrators of McMickle an account, claiming payment of the amount due upon the contract and notes, which was rejected by the administrator.

On the fifth day of April, Sinton, by writing, assigned his interest

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in the bond, notes, and claim against the estate, to the plaintiff, Bagley. In the account presented to the administrator it is in substance stated, that the lot was purchased for \$14,000, on which was paid \$8,420, leaving a balance, with the interest, of \$6,580, for which notes were given, drawing interest, as is recited in the bond; then of the date of June 4th, 1851, McMickle is credited by the proceeds of the sale of the property, "under power of sale from said McMickle, \$3,000," and the balance of principal and interest is claimed to be due, which, in the aggregate, now amounts to something over \$20,000.

Upon these proofs the plaintiff rested, and the defendant went to the jury upon the same evidence, and asked the court to instruct them that the testimony was insufficient to support a verdict, for any sum, in favor of the plaintiff; when the court in substance charged the jury as is set forth in the statement on this motion.

In consideration of the fact that this case has already been twice before the Supreme Court, although upon a different statement of facts from that in which it is now presented, I have taken some pains to carefully consider and examine the law applicable to actions upon lost notes.

In England the doctrine appears to be established that there is, and should be, no remedy *at law* for the holder of a negotiable note which has been lost, to recover the contents from any antecedent party on the note, whether he is the maker or endorser; but that the sole remedy is, and should be, in equity, where the relief will be granted upon the holders proving the loss, and giving a suitable bond of indemnity.

In the United States, unless there are statutory regulations on the subject, there has been much diversity of judicial opinion. In some of the States, the English doctrine has been maintained in the affirmative, in others it has been held in the negative, and again in others the holder has been allowed to sue at law, if he executes a suitable instrument of indemnity. Kent and Story seem to think that the weight of authority is in favor of the exclusive remedy in equity. The same doctrine is extended to cases of demands for payment, and upon actual payment being made, the note should be surrendered, or if lost indemnity against a second payment must be given or tendered. *Hansard vs. Robinson*, 7 Barn. & Cress., 90; *Story on Promissory Notes*, §§106-112, 244, 445, 446; 3 Kent's Com., 114, 115, and note (d); 2 Gr.

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Ev., §156, and note (8); 1 Gr. Ev., §558, and notes, and the numerous authorities cited by these commentators.

And it is said to make no difference as to the rule of law if the note is so old that the statute of limitations has attached upon it. 3 Phil. Ev., 7; Bailey on Bills, 299; Story on Prom. Notes, §449, and note (1).

There is a recognised distinction in some of the authorities between cases where the document is, and those in which it is not, the foundation of the action in regard to the admission of secondary evidence of its contents. In some instances, where it is merely auxiliary to the action, strict proof of loss has not been required, and even where it is the foundation of the action the rules of evidence, in proving the loss or destruction, are not universally settled. Persons interested in the action, and the parties themselves, have sometimes been held competent witnesses, or their affidavits have been admitted in regard to facts and circumstances necessary to lay the foundation of secondary evidence; but perhaps an equal number of cases may be found maintaining the opposite doctrine. The numerous authorities will be found collated in 2 Part of Cowen & H., notes to Phil. Ev., 408.

The affidavit of the party, as evidence of loss or destruction of the instrument, has been received upon the ground that it is preliminary and incidental, addressed solely to the court, and not affecting the issue to be tried by the jury; but they are restricted to the question of loss, and are not allowed for the purpose of disclosing the contents of the lost instrument, and should not be received at all if other testimony is attainable. If the party making the affidavit is competent to testify generally in the cause, he must be sworn and examined as an ordinary witness, that the advantage of a cross-examination may be preserved. When the foundation for secondary evidence is laid, the case must be proven before the jury by primary or secondary testimony, as fully as if the affidavits had not been introduced. *Mason vs. Tallman*, 34 Me. R., 472; *Davis vs. Black*, 5 Smedes & Marshall, 226; *Adams vs. Leland*, 7 Pick. R., 62; *Donalson vs. Taylor*, 8 Pick. R., 390; *Pomard vs. Smith*, 8 Pick. R., 272, 278; *Marshall, C. J.*, in *Taylor vs. Riggs*, 1 Pet. R., 591, 596-7; 16 John. R., 193, 195-6; *Bun vs. Knen*, 7 Black. R., 152.

It is not as a matter of course that a party is allowed to introduce

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secondary evidence, even when he brings direct proof of the fact of destruction or loss. If the destruction was accidental, or done through mistake, or under an erroneous impression that the paper was of no use or value, secondary evidence would be allowed ; but if a party voluntarily and willfully destroys his primary evidence, through carelessness, or for any fraudulent purpose, he excludes himself from the benefit of secondary evidence ; and sometimes the facts and circumstances connected with the destruction have been submitted to the jury, to be passed upon by them in considering their verdict. Cowen & Hill's notes to Phil. Ev., 2d Part, 406 ; The Bank of the U. S. vs. Hill, 5 Conn. R., 111 ; Page et al. vs. Page, 15 Pick. 5., 368 ; Blade vs. Noland, 12 Wend. R., 173 ; Garlock vs. Geortner, 7 Wend. R., 198 ; 9 Whea. R., 483, 487 ; *ib.* 596.

I will refer more fully some of the cases most pertinent and analogous, in principle and facts, to the one under consideration.

In the case of U. S. Bank vs. Hill, 5 Conn. R., the court say, "when the holder of a bill voluntarily and intentionally destroys it, or alters it fraudulently, he has no remedy ; but, if he loses, cancels, alters, or destroys it by accident or mistake, his rights are not affected ; his evidence only is impaired. A bill or note is not a debt, it is only primary evidence of a debt, and when this is lost, impaired, or destroyed *bona fide*, it may be supplied by secondary evidence."

Page et al. vs. Page, 15 Pick. This was an action by executors on a note, by defendant payable to the testator. After the plaintiffs, by the affidavit of one of them, had proven the loss of the note sufficiently satisfactorily to the court to admit secondary evidence, they then gave evidence tending to show that after the death of the testator defendant admitted that *he had the note in his possession*, stating the date and amount, and acknowledged that it was then due, and he was ready to pay it when an executor was qualified and ready to receive it. These points were controverted, and it was left to a jury to determine the facts. The trial was before Ch. J. Shaw, who, in his instructions to the jury, remarked that ordinarily the non-production of a note by a party claiming under it, raised a presumption of payment ; and after commenting on the affidavit, said further ; if the jury should be of the opinion that the note was not paid to the testator, but remained in the custody of the defendant at the time of the testator's decease, this

would rebut such presumption of payment. The rulings and judgment in the case were sustained by the Supreme Court of Massachusetts.

On the trial of the present suit the plaintiff relied upon the case just referred to, as an authority to sustain his action. The facts of that case are somewhat analogous to the one under consideration, except in one important particular: there, besides the affidavit, plaintiffs gave testimony to the jury of the defendant's admissions of liability, &c. Here the plaintiff gave no evidence or explanation to the jury to rebut the presumption against him, arising from the voluntary surrender and destruction of the note.

Garlock vs. Geortner, 7 Wend, 198. Action on a promissory note alleged to have been given under a special agreement, and *to be in the possession of the defendant*.

The case was tried in the court of Common Pleas. Plaintiff proved *the making and delivery*, &c., and called on defendant to produce it, and upon his refusing to do so, offered to prove that the plaintiff, under an impression that defendant was entitled to the possession of the note gave it to him to keep, under a special agreement. The court overruled the testimony; plaintiff was nonsuited and carried the case to the Supreme court. Justice Nelson in giving the opinion of the court reversing the judgment says: "The court below erred in refusing to admit the evidence offered to be given. The *execution and delivery* of the note by the defendant was proved, and whether it was intended to be given up and relinquished by the plaintiff or not, when put in defendant's possession, should have been submitted to the jury. * * The plaintiff should have been allowed, if he could, to explain the possession of the note by the defendant as well to rebut the *prima facie* inference of *extinguishment of it, as to account for its non-production on the trial.*"

Blade vs. Noland, 12 Wend, 173. Action on a note alleged to be destroyed or lost.

Plaintiff first proved the making and *delivery* of the note and by his own testimony and that of another witness, showed that he, plaintiff, had *burnt it up*, as plaintiff testified, the next day after it was given. There was also evidence of payment by defendant on account.

Judgment was rendered before a Justice, and in the court of common pleas, for the plaintiff, and the case then went to the supreme court.

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Justice Nelson in delivering the opinion of the court reversing the judgment, says : "The proof is, that plaintiff deliberately and voluntarily destroyed the note before it fell due, and there is nothing in the case accounting for, or affording any explanation of the act, consistent with an honest or justifiable purpose. Such explanation the *plaintiff was bound to give affirmatively*, for it would be in violation of all the principles upon which inferior and secondary evidence is tolerated, to allow a party the benefit of it who has wilfully destroyed the higher and better testimony. * * *

"I have examined all the cases decided in this court, where this evidence has been admitted, and in all of them the original deed or writing was lost or destroyed by time, mistake or accident, or was in the hands of the adverse party. Where there was evidence of the actual destruction of it, the act was shown to have taken place under circumstances that repelled all inference of a fraudulent design." * * After citing authorities and stating the foundation of the rule, he proceeds : "The above is in brief the foundation of the rule in these cases of secondary proof of instruments in writing, and it has been much relaxed and extended in modern times, from necessity and to prevent a failure of justice ; yet I believe no case is to be found where, if a party has deliberately destroyed the higher evidence, *without explanation showing affirmatively* that the act was done with pure motives and repelling every suspicion of a fraudulent design that he has had the benefit of it. To extend it to such a case would be to lose sight of all the reasons upon which the rule is founded, and to establish a dangerous precedent. We know of no honest purpose for which a party, without any mistake or misapprehension, would deliberately destroy the evidence of an existing debt ; and we will not presume one. From the necessity and hardship of the case, courts have allowed the party to be a competent witness to prove the loss or destruction of the papers ; but it would be an unreasonable indulgence and a violation of the just maxim that "no one shall take advantage of his own wrong, to permit this testimony when he designedly destroyed it."

Now in the case before us, as heretofore stated, the plaintiff by affidavits showed a voluntary destruction of the notes, and then gave in evidence the bond which describes the notes as having been executed.

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This is the entire testimony upon this branch of the case. The affidavits being addressed only to the court, *solely* upon the question of the destruction of the primary evidence, there was no evidence before the jury but the bond, which only tends to prove the execution, not the delivery, of the notes described therein.

There was no proof tending to show, that the notes had ever been *delivered* to plaintiffs, or whether or no they were negotiable; or what was their condition, contents or indorsements when they were destroyed; and yet, after plaintiff has been for years quietly sleeping upon his rights, and until the maker of the note is no longer among the living to give an account of the transaction, it is gravely contended that, by the law and upon this evidence, he is entitled to recover some \$20,000 against the estate of the deceased; upon obligations which, according to his admission before the court, were, some four or five years ago, with his consent, destroyed in a manner and under circumstances that raise against him a presumption—as strong as could be claimed by any party who takes up a note and destroys it—which he has not attempted to explain by testimony. If it should be authoritatively declared that such is the law: that a party, by making affidavit that he has voluntarily destroyed, or allowed the maker to destroy a note, and without disclosing the purpose or furnishing any further explanation, simply upon proof that it was executed to him, is entitled to recover, as upon a lost note, it will afford a summary and convenient mode of getting rid of objectionable conditions, covenants, limitations, &c., in deeds, notes, and other instruments, which it is not unreasonable to suppose the unscrupulous will avail themselves of, and will also render any person who may have paid and discharged his note, liable to be called upon a second time, unless he has taken a receipt, or is prepared to make proof of actual payment.

The danger and mischief to be apprehended from a relaxation of the rules of evidence to this extent, is too apparent to require illustration, and so long as it remains an open question in this State, a regard for the integrity of written contracts, and the protection of the parties thereto, will prevent its being obtained in this court. The doctrine of the cases which I have cited at length, is, in my opinion, sound in reason, principle and policy, and will be adhered to, until the proper tribunal of this State shall declare against it. The law is too clearly against

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the plaintiff, as it appears to me, to admit of argument, and the fact that the judgment in the action has been twice reversed in the supreme court, (although no new or different rule of law has been declared ; the reversal having been based upon a review of the facts and the incidental, rather than the main, questions of law,) is the only circumstance to give sufficient importance to the case to merit this extended consideration.

Upon the trial immediately preceding this one, witness Sinton was sworn and testified before the jury in regard to the facts and circumstances attending the destruction of the notes ; the payment thereon ; amount due, &c.

The question of fact, in accordance with the doctrine of the cases of *Page et al. vs Page* and *Garlock vs. Geortner*, were without instructions from the court, submitted to the jury, and, as I thought, fairly passed upon by them. If the law is correctly declared in the case of *Blade vs. Noland*, it is questionable whether the court should have permitted the case to go to the jury.

The supreme court reversed the judgment, as it appears, principally on the ground that the verdict, in favor of defendants, was, as they believed, the result of mistake, prejudice or corruption, and that this court should have granted a new trial. There having been no affidavit or allegation of misconduct on the part of the jury, on the motion for a new trial, as provided in the practice act, the attention of the court was not called to that matter : except so far as this—insufficiency of the evidence to justify the verdict.

Upon the present trial the defendant dispensed with the testimony of Mr. Sinton, and the case went to the jury upon an entirely different state of facts from those heretofore proven. The instructions to the jury were such as I thought it my duty to give, upon the case, submitted. They could not have taken the plaintiff by surprise ; for, by referring to the record of the preceding trial, it will be seen that plaintiff then rested his case without the testimony of Mr. Sinton and upon proofs similar to these, when a motion for nonsuit was made and, instead of being granted, plaintiff was allowed to introduce further testimony and Mr. Sinton was then sworn and examined.

The rulings of the court on the motion for a nonsuit, and the subsequent motion for a new trial, as appears by the statement and opinion

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of the court on file, were, substantially the same as the instructions to the jury upon this trial. Instead of being erroneous, in my judgment, the charge to the jury was proper, and is sustained by precedent and authority. New trial denied.

CORDIER vs. SCHLOSS.

Fourth Judicial District Court, September, 1857.

JUDGMENT BY CONFESSION—STATEMENT.

A void judgment by confession will not be set aside, on notice and motion of a party who has an action and attachment pending against the same defendant, but no judgment. The proper remedy in such cases is by original writ in equity.

The statute on confession must be *strictly pursued*. Unless substantially complied with, the judgment is a nullity.

The statement authorizing the judgment, should contain facts sufficiently full and complete to give information how the liability "*arose*," and to "*show*" that the sum confessed therefor is justly due: if defective in this, the judgment is irregular.

It should also authorize a payment for a specified sum, and not leave it to be ascertained by calculation.

Whether material interlineations, not noted in the statement, and when the authority given is, to enter the payment in the "clerk's office," (no court being named) is error, *quære*.

The facts in this case are substantially as follows: The firm of Joseph S. Kohn & Brother were merchants doing business in the city of San Francisco, and were indebted to this plaintiff and Schloss & Heilbroner of New York city.

On the night of the 18th of February, 1857, Joseph S. Kohn and Morris Kohn, the copartners of the said firm, confessed a judgment to said Schloss & Heilbroner, which was entered in the District Court of the Fourth Judicial District, in the following form:

In the District Court of the Fourth Judicial District.

STATE OF CALIFORNIA, }
City and County of San Francisco. }

SCHLOSS & HEILBRONER,
composed of
M. Schloss and Joseph Heilbroner. }

vs.
JOSEPH S. KOHN & MORRIS,
partners under the firm name of
Kohn & Brother. }

Cordier vs. Schloss.

The defendants state and admit that they are justly indebted to the plaintiffs in the sum of two thousand and four hundred dollars, and interest thereon, at the rate of one per cent. per month, from the 15th day of May, 1856, for which amount they consent that judgment may be entered against them by the clerk of said court in his office, and the facts out of which said indebtedness [accrued] are as follows, to wit: That the plaintiffs are the owners of the following promissory note, made by said defendants, to wit:

\$2,400.

SACRAMENTO, May 15, 1856.

Eight months after date we promise to pay to the order of ourselves, in the city of New York, two thousand and four hundred dollars, at the rate of one per cent. per month until paid, value received.

(Signed,)

JOSEPH S. KOHN & BROTHER.

That the said note was given by the said defendants to the said plaintiffs, for goods sold and delivered to the defendants by the firm of Schloss & Heilbronner, the plaintiffs aforesaid, [and money had and received by defts.] That the consideration for said promissory note was said [money and] goods, sold [by] plaintiffs to, and received by them, the defendants aforesaid.

That the sum above by us confessed, is justly due to the said plaintiffs on the foregoing note, after allowing all just credits and offsets, without any fraud whatever, for which amount they do hereby authorize the clerk of said court to enter up judgment against them, the said defendants.

Dated San Francisco, the —— day of February, 1857.

CITY AND COUNTY OF SAN FRANCISCO.

Joseph S. Kohn and Morris Kohn, the defendants aforesaid, each for himself, being sworn, says that the above statement of confession is true.

JOSEPH S. KOHN,

MORRIS KOHN.

Sworn to before me this 18th day of February, A. D. 1857.

P. K. WOODSIDE,

Deputy Co. Clerk.

To which was appended the note itself, which appears to have been made while Kohn & Brother were established at Sacramento, previous to removing to San Francisco.

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Those words in brackets in the confession, are the interlineations referred to in the opinion.

This confession was filed on the 19th day of February, 1857, in the clerk's office of the Fourth Judicial District Court, early in the morning, and execution issued thereon.

On the same day, at a late hour, E. Cordier commenced an action against Kohn & Brother for \$4000, and attached the same property.

Cordier then made an affidavit setting forth the facts in the confession of judgment, and alleging fraud, moved the court upon notice to set aside the confession as against his claim.

The court was of the opinion, that Cordier must obtain a judgment before he would have sufficient standing in court to entitle him to attack the judgment in this summary way.

As between the parties thereto the judgment may be valid although void as to judgment creditors ; but Cordier's action being undetermined he is not, and possibly never may be, a judgment creditor.

The court further stated that no adjudicated case had been produced and the court know of none, where it had been held that a void judgment could be set aside on notice and motion upon the application of a party who had a suit pending against the same defendant and expected to, but had not in fact, obtained a judgment. That under a previous decision of this court—affirmed in the supreme court—Cordier, having a lien by attachment, may proceed in equity by original writ and obtain protection and relief, and this was his proper remedy.

Cordier then commenced an action in equity against Kohn & Brother and Schloss & Heilbronner, and obtained an injunction restraining the payment of the money of the sale on execution to Schloss, and had the same await the decision of the court.

E. Casserly and Harmon & Labatt, for plaintiff.

Shattuck, Spencer & Reichert and E. D. Sawyer, for defendant.

HAGER, J.—By the law of this State, judgments by confession are authorized to be entered of record by a summary proceeding in the office of the clerk of the court, without any action on the part of the court itself.

The statute being in derogation of the common law, should be strict-

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ly pursued: in entering the judgment the clerk acts ministerially under its authority, and all the provisions of the act must be substantially complied with, or the judgment is a nullity.

The defendant is required to make a statement which he must sign and verify by his oath; this must authorize the entry of the judgment for a specified sum, and "if it" (the judgment) "be for money due, etc. it" (the statement) "must concisely state the facts out of which it" (the money due) "arose, and show that the sum confessed therefor is justly due." Practice Act § 374, 375.

The statement in question sets forth the facts of indebtedness as follows: "The plaintiffs are the owners of a promissory note made by defendants," which is copied at length—"that the said note was given by the defendants to the said plaintiffs for goods sold and delivered to the defendants by the firm of Schloss & Heilbroner, the plaintiffs aforesaid, and money had and received by defendants: that the consideration of said promissory note was said money and goods sold by plaintiffs to, and received by them, the defendants aforesaid: that the sum above, by us confessed, is justly due to the said plaintiffs on the foregoing note," etc.

Neither the amount, value, or date of sale of the goods sold and delivered, nor the amount or date of the money had and received, nor whether received from Schloss & Heilbroner or some other person, are stated. It cannot be gathered or determined how the sum mentioned in the note, is made up, and although it is so declared in words, yet the statement itself does not, by *stating concisely, the facts constituting the liability*, in the language of the act and according to the common acceptance of the word, "show" that the sum is justly due.

As a statement in a complaint, of facts constituting a cause of action for goods sold and delivered, or money had and received, it would hardly be contended that this in question, would be sufficient, and yet the provisions of the act in regard to the statement of facts in a pleading, are substantially the same as that in case of judgment by confession. practice act §§ 39, 475.

In my opinion, the statement of facts in the confession of judgment is not in conformity with the statute, and is insufficient.

Besides those noted, there are other objections to the statement, some of which might perhaps be well taken, to wit:

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1st. The authority is not given, as required by the law, to enter the judgment for a *specified sum*. The statement was made February 18, 1857, and authorized a judgment for \$2400 and interest thereon at the rate of one per cent. a month from the 15th of May, 1856. Thus the sum, instead of being specified, was a matter of calculation.

2d. Judgment is authorized to be entered by the clerk, *in his office*. The statute intends it to be of a court, § 376—and, although the statement is filed with the clerk, and he enters it in the judgment book, it would be safer practice to specify the court where the judgment is intended to be confessed and entered of record.

3d. There are material interlineations which are not noted, and the affidavit annexed, instead of the statement itself, is signed by the defendants therein.

Having arrived at the above conclusion, it is unnecessary to pass upon the other questions raised upon the trial and argument.

The judgment by confession, so far as it effects the lien and judgment of the plaintiff in this action, should be set aside.

Decree ordered accordingly.

WHEELER vs. McENTIE.

Twelfth Judicial District Court, August, 1857.

ATTACHMENT—NON-RESIDENT.

The mere presence of a party in the State of California does not constitute a residence.

He must have established his abode here, and purpose to change his last place of residence.

In default of these facts he will be considered a non-resident, and his property will be liable to attachment.

Motion to discharge attachment. The facts are reported in the opinion.

A. H. Hitchcock, for plaintiff.

Tompkins, for defendant.

NORTON, J.—This case presents the constantly recurring question,

Wheeler vs. McEntie.

what constitutes a residence? The defendant has heretofore resided with his wife and children, and carried on business in Cohoes, in the State of New York. Having failed in business, he left there last March, and came to San Francisco, bringing with him a quantity of goods, but leaving his family at Cohoes. Upon his arrival here, in April last, he sent for his family, who arrived here on the 15th of July. In the mean time, on the 19th of June his goods were attached, on the ground of his being a non-resident of this State. He moves to discharge the attachment, on the ground that he was then a resident of this State.

In all the definitions given of a legal residence, the controlling facts are, that it is a party's fixed dwelling place, with the intention on his part to continue it as such. The fact and the intent, it is said, must concur. But the mere presence of a party is not always sufficient to constitute the fact. He must have established his abode. In the present case, the defendant was in this State, and probably did not intend to return personally to his former residence, but his family were still living at his former residence, which continued his residence until he acquired another. There is no evidence of a purpose to change his residence when he left Cohoes; no information of such intention was given to his family, and no directions for them to follow him, and at the time this attachment was issued, he had not engaged in any business here, or done any act appropriate to a residence, or indicative of any intention to reside here, at San Francisco, any more than at any other place in this State, or indeed elsewhere. His condition was that of a transient person, who, after his arrival here, having determined to change his residence, was awaiting the arrival of his family, with the intention, upon their arrival, to fix his residence somewhere in the State of California, but had not as yet become a legal resident of the State.

The motion to discharge the attachment must be denied.

Meiggs vs. Scannell.

MEIGGS vs. SCANNELL.

Twelfth Judicial District Court, August, 1857.

REMITTITUR—REPLEVIN.

What is the effect of the words "judgment reversed and cause remanded," in a remittitur from the Supreme Court?

The finding in the case of a verdict in replevin must recite the value of the property, and the amount of damages for detaining the same if the property be returned.

This action was instituted in October, 1856, to recover possession of the ship "Madonna," and damages for her detention, or the value of the vessel, being \$6,000. The vessel was seized by the defendant, as sheriff of San Francisco County, on an execution *inter alias*, and was claimed by this plaintiff. The cause was tried, and the court, without a jury, found that the plaintiff "was entitled to a recovery of the property." The cause was appealed; the Supreme Court reversed and remanded the cause. The defendant then moved for judgment upon that remittitur.

Whitcomb, Pringle & Felton, for plaintiff.

B. S. Brooks, for defendant.

NORTON, J.—This is an action to recover possession of personal property. It was tried by the court without a jury, and a finding had, and a judgment thereon for the plaintiff, to wit: That they were entitled to a recovery of the property. Upon appeal this judgment was "reversed and cause remanded." The defendant now asks, on the remittitur, that a judgment be entered that the plaintiff return the property, or pay the defendant \$12,000, "the sworn value." The plaintiffs say that there must be a new trial.

Where an action is tried by a jury, and a general verdict rendered, if the judgment is reversed and cause remanded, it will, in general, be necessary to have a new trial, and in any such case, it would be rather anomalous to have a record show a general verdict in favor of one party, and a judgment in favor of the other. In equity suits, under the old system, the evidence was before the same person who applied

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the law, and in case of appeal was also before the appellate court. Under our system it may be different in some cases, but generally there will be no occasion for a new trial. So, if a special verdict is found by a jury, or the action is tried by the court, and the facts are set forth in the finding, there will usually be no occasion for a new trial. But when from inadvertence, or other cause, all the facts necessary to determine the rights of the parties as they shall stand after the law of the case is settled by the appellate court, and evinced by its opinion, are not found, it may be necessary to have a new trial.

In the present case there is no finding as to whether the property has been delivered to the plaintiff, nor does it appear by the pleadings, nor is there any finding of the value of the property, or any damages for the taking or detention. The only conclusion that the appellate court could draw from the record before it was, that the property still remained with the defendant; and that the only judgment necessary to give him his rights, was a judgment the reverse of the one given by the court below, namely, that the plaintiffs were not entitled to the recovery of the property. The affidavit of the plaintiff as to the value of the property, might be evidence on the trial, but it is not a fact in the case. Besides, the value to be paid is *probably* not the value at the time the property was taken, but the value at the time the property is to be delivered. The party has not a right to the value absolutely, but only in lieu of the property, if it cannot be found. If the property has deteriorated in value since the taking, the remedy is by assessing damages.

I can find no authority in the opinion of the Supreme Court, or in the language of the remittitur, or in the facts as found on the trial, to give the defendant the judgment he asks. As neither party has asked to have a simple judgment that the plaintiffs are not entitled to a recovery of the property, which is the only one I am authorized to give, I shall at present only deny the defendant's motion.

People vs. Garibaldi.

PEOPLE vs. GARIBALDI.

Fourth Judicial District Court, August, 1857.

REASONABLE DOUBT—MALICE AFORETHOUGHT.

By reasonable doubt, is not meant a mere suspicion that the defendant may be innocent or guilty, or that any theory of the defense or prosecution may be correct, but a reasonable doubt of the defendant's guilt, after considering the whole testimony. The question is rather, is the judgment convinced? or, is there, after a review of the testimony, a reasonable doubt, and the judgment is not entirely satisfied?

Malice aforethought, according to its legal meaning, is not confined to murders committed in cold blood, with settled determination and premeditation, but extends to all cases of homicide, however sudden the occasion, where the act is done with such cruel circumstances as are the ordinary indications of a wicked, depraved, and abandoned heart; as when the punishment inflicted by a party, even upon some sudden provocation, is outrageous in its nature and continuance, and beyond all proportion to the offense, so that it is rather to be attributed to malignity and brutality, than to human infirmity.

The facts of the case as proven on the trial are briefly as follows:—That on the night of the killing, the deceased and prisoner met in a dance house, on Pacific street, and after having some dispute about a place on the floor for dancing, they went out to fight. The prisoner gave the invitation to fight, and the deceased assented. The prisoner then took off his coat, went out of the house, followed by deceased, and a fight ensued between them in the street. Whilst they were thus engaged the prisoner was seen to disengage himself, step back a short space, run his hand down into his pantaloons, then to withdraw it as if drawing something out, and then to rush upon deceased, and strike or thrust at his body. Another person was also seen striking over the parties upon deceased's head. Then within a few moments deceased fell, bleeding from a severe wound in the body, through the ribs into the chest and lungs, and almost immediately expired.

Upon this being proclaimed, and a call made to arrest the slayer, the prisoner and another person ran from the ground down the street. The one person who ran was recognized as the prisoner, who had on a white shirt, and was without his coat and hat. The other was unknown, and had on a blue or gray shirt, and had a hat in his hand. The prisoner was arrested a short distance below by an officer; blood was found upon his clothes and person, and a cut upon his left wrist and

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right thumb, and on the next morning a knife was found in the street, near the spot where the prisoner was arrested.

H. H. Byrne, District Attorney, for prosecution.

G. F. James and *G. W. Tingley*, for defense.

HAGER, J.—*Gentlemen of the Jury*:

The prisoner has been indicted by the Grand Jury of the county and charged with the murder of Richard Smith. To the indictment the prisoner has pleaded "not guilty." The issue thus formed, whether or not he is guilty of the offense charged against him, or of any other offense which is necessarily included in that with which he is charged in the indictment, you have been empaneled as a jury to try and determine by your verdict.

It is my duty to declare to you such matters of law as I may think pertinent to the issue, and necessary for your information; and although I can state the testimony, it is exclusively your province to consider, judge of, and apply the facts as disclosed by that testimony.

If you come to the conclusion that deceased came to his death from the immediate effect of a wound inflicted with a knife by the defendant, then he must be guilty either of *murder in the first degree*, *murder in the second degree*, *manslaughter*, or *excusable or justifiable homicide*. These are severally defined by our statute law as follows: (which the court here read to the jury).

In a criminal action the defendant is presumed to be innocent until the contrary be proved, and in case of a *reasonable doubt* as to whether or not his guilt be reasonably shown, he is entitled to be acquitted; but if the killing be proved, then the burden of proving circumstances of mitigation, or that justify or excuse the homicide, devolves on the defendant, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the defendant was justified or excused in committing the homicide. By *reasonable doubt*, is not meant a mere suspicion that the defendant may be innocent or guilty, or that any theory of the defense or prosecution may be correct, but a reasonable doubt of the defendant's guilt, after considering the whole testimony. The question is rather, is the judgment convinced? have you come to a conclusion in your own

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minds as to the guilt or innocence of the party ? or is there, after a review of the testimony, a reasonable doubt, and your judgment is not entirely satisfied ? The defendant is entitled to the benefit of such doubts if they exist.

Malice aforethought, according to its legal meaning, is not confined to murders committed in cold blood, with settled determination and premeditation, but extends to all cases of homicide, however sudden the occasion, where the act is done with such cruel circumstances as are the ordinary indications of a wicked, depraved, and abandoned heart ; as when the punishment inflicted by a party, even upon some sudden provocation, is outrageous in its nature and continuance, and beyond all proportion to the offense, so that it is rather to be attributed to malignity and brutality, than to human infirmity.

Express malice is the deliberate intention unlawfully to take away the life of a fellow creature, which is manifested in external circumstances, and capable of proof.

Malice is implied where no considerable provocation appears, or where all the circumstances of the killing show an abandoned and malignant heart. The malice necessary to constitute the crime of murder is not confined to an intention to take away the life of a person, or to spite, malevolence, or revenge, which may be manifested by external acts and declarations, but also includes an intent to do an unlawful act, which may probably end in depriving a person of life. Where no malice is expressed the law will sometimes imply that there was malice, as, by way of illustration, where a person willfully poisons another ; or if the killing be done without a considerable provocation ; for no person, unless of an abandoned and malignant heart, would be guilty of such an act upon a slight, or no apparent cause.

(The court then stated the testimony.)

Now it is not controverted but that the deceased died from the wound received, and you will probably have no difficulty in coming to a conclusion upon that point.

The next question for you to determine is, by whom was this wound inflicted ; or rather, does the testimony point out the prisoner as the guilty perpetrator of this act ? Is your judgment satisfied, from the acts, position, and declarations of the prisoner, the blood and cuts upon his person, as disclosed by the evidence, or from any other proven

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acts, that he inflicted the mortal wound? or are you unable to come to a conclusion in your own minds, and do you entertain a reasonable doubt of the prisoner's guilt, or a belief that some other person did the deed? Can you explain the circumstances against the prisoner, and find them consistent with his innocence? How came those cuts and blood, and why did he reach down into his pantaloons? These are questions and circumstances to be passed upon by you. It is not necessary that you should only consider the positive or direct proof, in arriving at a conclusion; you may *infer*, or presume, guilt from circumstantial evidence alone, and, in arriving at a verdict, you are at liberty to take into consideration any circumstances in evidence, either for or against the prisoner.

It is natural and reasonable to suppose that a criminal, as far as possible, would conceal the positive proof of his guilt, and if convictions could only be had upon positive proof, it might be difficult, in some of the plainest cases, to bring the guilty to justice.

In regard to what has been termed the confessions of the prisoner, I will charge you as follows.

(The court read from 1 Greenleaf on Ev., §§214, 215.)

Your verdict, if general, should be either *guilty*, or *not guilty*. If the prisoner is neither guilty of murder in the first or second degree, nor of manslaughter, your verdict should be not guilty. If your verdict should be guilty, you must specify the degree of guilt, or rather, the particular grade of crime. If you should come to the conclusion that the prisoner unlawfully killed the deceased, and that the killing was *willful*, *deliberate*, and *premeditated*, you may, by your verdict, find him guilty of *murder in the first degree*. If you should come to the conclusion that the prisoner, with malice, either express or implied, unlawfully killed the deceased, but that the act was not willful, or was without deliberation or premeditation, you may find him guilty of murder in the second degree. You may also, if you should so find, render a verdict, guilty of manslaughter.

In conclusion, gentlemen, permit me to remind you of the important, the solemn duty that now devolves upon you. Human life is involved in the issue submitted to you, and whilst attentively examining the evidence, and seeking for every circumstance that will extenuate or excuse the offense charged against the defendant, you must not forget

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that in the very heart of our city, in one of our most public streets, a citizen has been deprived of life by the hand of violence ; and whilst you should be cautious that you do not condemn the innocent, you should also be cautious that you do not set the guilty free, and fix upon our land the blood of a murderer.

With these remarks I leave you to your deliberations, in full confidence that you will be able to agree upon such a verdict as will be sustained by the evidence and your own consciences.

IN RE. ARAM.

Sixth Judicial District Court, October, 1857.

IMPRISONMENT FOR DEBT—DISCHARGE.

A person imprisoned for concealing his property, with the intent to defraud his creditors, must be released if he satisfy the court he no longer has any property under his control.

Motion to discharge the defendant on a writ of habeas corpus.

BORTS, J.—Application for discharge under the “Act for relief of persons imprisoned by civil process.”

The defendant being sworn, unequivocally denies the possession of any property except a very small portion of that by law exempt from execution. Notwithstanding this, his creditors contend that he has property, which he is concealing from the operation of legal process.

The statute is penal in its nature, and, as I understand it, the suspicion of concealment having been extinguished by the oath of the defendant, the onus of their allegation rests upon the creditors, and unless I am satisfied, beyond a reasonable doubt, that the defendant has property under his control, which he is concealing, he must be discharged. In determining the issue presented by this case, which is simply the present ability of the defendant to pay the judgment under which he is confined, his former conduct is wholly immaterial. No matter how criminal it may have been, his continued imprisonment is only intended as a means of coercing the surrender of his property ; when it ceases to answer this end it becomes illegal. It is long since

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the humanity of the law permitted the crime of debt to be punished by imprisonment. To the criminal laws, a citizen may be compelled to answer for the perpetration of a fraud. Of that it is not our province to inquire. The defendant is imprisoned on civil process, and he is here, not to answer to the community for the perpetration of crime, but to his creditors for the money he owes them.

He swears positively that he is without the means of payment. A great latitude has been allowed the creditors in their attempt to disprove his statement. They have sought to do it by tracing effects to his hands, and requiring him to account for their disbursement. This mode of proceeding to disprove the solemn oath of the defendant, is in its nature unsatisfactory, and becomes weaker and weaker as the period of acquisition recedes from the period of investigation.

It is impossible that the court could tolerate an investigation for such purposes, of the acts of a lifetime, consequently some reasonable period must be fixed on as the limit of such an investigation. Accordingly, I go back to April, 1856, when the defendant dissolved his partnership with Palmer, and began to trade on his own account.

Upon the dissolution of the partnership, he admits the possession of goods and debts to the amount of about \$7,000. He afterwards received goods, and borrowed money, together, from April, 1856, to January, 1857, amounting to about \$16,500. This makes \$23,000 received during this period, to be accounted for. He swears to a detailed account of disbursements during this time, amounting to about \$19,000. This consists of payments for goods, family expenses, freight, &c. He then sells out his stock on hand, together with his storehouse, for \$3,000, and this sum, he states, he afterwards expended in paying debts due to his brother, and in lawyer's fees. Let it be remembered that it is admitted that the defendant is an illiterate man, and kept very imperfect books, even of his mercantile transactions. This statement purports to be only an account of his disbursements, as near as he can remember them.

It will appear then, that there is nothing unreasonable or contradictory in his statement; nothing in it, *per se*, to invalidate his oath of inability to discharge his liabilities. Now as to the evidence *aliunde* adduced by the creditors, viz: the depositions of the two brothers of the defendant, and that of his former partner, Palmer, although there

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are some discrepancies, as might be expected, both between their several statements, and those of the defendant, in regard to minute transactions, running over the space of twelve months, upon the whole, they tally remarkably well. Whether these transactions fixed upon the defendant the crime of obtaining goods under false pretenses, or an intention to reduce bulky assets to money, and fly the country, is not the question. I see nothing in them to satisfy me that the defendant has not, as he swears he has, divested himself, and been divested by operations of law, of all his available assets. If it shall hereafter appear that his statement is untrue, he will have to answer to the laws of his country for the commission of perjury. If he be found with property, his creditors can still seize it on execution. Where there is so much to be risked, and so little to be gained, by falsehood, the defendant's oath is entitled to great weight.

I see nothing in the case to satisfy me that the defendant is hiding or concealing any of his effects from his creditors.

Let him be discharged.

SANCHEZ vs. STOUT.

Twelfth Judicial District Court, September, 1857.

CONTINUANCE.

A defendant, as well as a plaintiff, may have a cause continued, after the trial has commenced, on the ground of surprise.

This is an action of ejectment, brought by Francisco Sanchez, against Arthur B. Stout, and others, to recover possession of an hundred vara lot, situated in the city of San Francisco. The plaintiff submitted the case upon the pleadings, it having been averred in the complaint, and not denied in the answer, that a grant of the land in controversy, had been made to the plaintiff.

On the back of the grant, which was put in evidence by the defendants, Sanchez executed a deed of the premises to one "El Moro," who, dying, conveyed the same by a "Spanish will," to the grantors of these defendants. A witness, to prove this will, named Gregoreo Escalante,

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was offered by the defendants. Upon his taking the stand, plaintiffs examined him touching his competency as a witness, when he stated that he was a native of Manila, that his father was a Spaniard, but did not know the parentage of his mother. A witness was then introduced by plaintiff, who had long resided in Manila, and who, from Escalante's appearance, judged him to be a "Chinese Mestizo," i. e. a mixture of Chinese and other blood. Plaintiff objected to the introduction of his testimony, as being within the rule declared by the supreme court in the case of the People vs. Hall, 4 Cal. p. 399. The court sustained the objection, and did not permit him to be introduced. A part of the testimony in a deposition offered in evidence by defendants, was also ruled out.

Defendants then asked to have the jury discharged, and the case go over the term, on the ground that they were surprised, firstly, by the exclusion of portions of the deposition, and secondly, by that of the witness Escalante.

In support of the motion, the defendants read an affidavit to the effect that they had no suspicion that the witness was not a native Californian, until the objection was taken on the trial, but supposed that he was, from his appearance and language, and his having been one of the old residents of this district.

Bennett and Sutherland, for plaintiff.

Crockett & Page, for defendants.

NORTON, J.—Although it is not usual for a case to be continued, after trial begun, at the instance of the defendant, on the ground of surprise, upon his part, yet there seems to be no good reason why such a course should not be permitted. The practice which obtains in our courts, of allowing a plaintiff to withdraw a juror and continue a case, on the above ground, is one which, it seems to me, is not founded in good policy; it would be better, in all such cases, to let the trial proceed, and leave the parties to their remedy, by a motion for a new trial, but the practice is too well settled to be now changed by this court. The second ground upon which this motion is based, falls within the established rule, inasmuch as Escalante's appearance and language certainly would tend to throw counsel off from any inquiry into

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his nativity, but which being ascertained, renders him clearly incompetent as a witness. The first ground of surprise advanced for the granting of this motion, is insufficient, but as the second would have been a good one, under our practice, had it been presented by a plaintiff, under similar circumstances, I will hold it to be so now, and will grant defendants' motion.

THOMAS vs. THOMAS.

Twelfth Judicial District Court, October, 1857.

ABILITY TO SUPPORT—DIVORCE.

What constitutes such an ability, within the meaning of the statute allowing divorces, on the part of the husband to support the wife, that the omission on his part to do it will authorize a divorce.

Burbank, for plaintiff,

Defendant not in court.

NORTON, J.—The plaintiff asks a divorce on the ground that the defendant has, for three years, wilfully neglected to furnish her with the common necessities of life, having the ability to provide the same. The proof of this ability is, that he is an able-bodied man, in good health, and a carpenter and joiner by trade, and able to earn the means of supporting his family. I had some question, whether the ability contemplated by the statute was not some fund on hand, or some property out of which the means might be realized. But it is settled upon authority, that a man will be required to furnish alimony to his wife, in case of divorce, out of his daily earnings, if he has no other means; and upon principle, the same rule must apply to a husband and wife while living together. He must furnish her the common necessities of life, if he is able to earn the means. (Bishop on Marriage and Divorce, sec. 537-604; Kirby vs. Kirby, 1 *Paige*, 261; Lawrence vs. Lawrence, 3 *Paige*, 267.) The plaintiff is, therefore, entitled to a divorce on the proofs.

Selby vs. Riley.

SELBY vs. RILEY.

Sixth Judicial District Court, October, 1857.

FAILURE OF CONSIDERATION.

If property is sold, while in the possession of the sheriff, by virtue of an attachment, duly issued, the title, which remains in the vendor, will pass to the vendee, but subject to the lien created by the attachment—and in an action by the vendor, on a promissory note, given to him in payment for the property so encumbered, the vendee cannot plead this lien as working such a failure of consideration, as will entitle him to recoup the amount expressed on the face of the note, to the extent of the lien. To such a vendee the doctrine *caveat emptor* applies.

The facts are fully set forth in the opinion.

P. L. Edwards, for plaintiff.

Upton & Hereford, for defendants.

BORTS, J.—The plaintiff and defendants being in the city of Sacramento, the former sells to the latter certain personal property, then in the town of Folsom, and upon the road between Folsom and Jackson. The defendants execute and deliver to the plaintiff their promissory note for the purchase money, and receive an order upon the agent of the plaintiff for the delivery of the property. This action is brought upon the promissory note, and the defendants plead a failure of consideration. To sustain their plea, they prove that the property was attached by the creditors of the plaintiff, on the night of the day on which they purchased, and that under this attachment, the property was finally sold, and that they never reduced it to actual possession. As to a portion of the property, it appears that the sheriff had attempted to levy an attachment upon it, previous to the sale by the plaintiff to the defendants; but under my view of the law, it is not necessary to decide whether the acts of the sheriff amounted, in law, to a levy or not.

Between the parties there can be no doubt that the act of sale was perfected by the delivery of the note on the one hand, and the order for the property on the other. From that moment the right of dominion was transferred from the vendor to the vendee, just as much as if the

consideration of the transfer had been the payment of money, instead of the promise to pay, and there are no circumstances that will constitute a defense to this suit, that would not sustain an action to recover back the money, if it had been actually paid.

Under circumstances like these, a *bona fide* vendee is allowed a reasonable time to reduce the property purchased into actual possession. See *Montgomery & Berry vs. Hunt*, 5 *Cal.* 366. It is possible that by the *laches* of the vendee in this respect, he may let in an attaching creditor, but he can surely take no advantage of his own wrong. As far, therefore, as the attachment after the sale, is concerned, if by it the vendee was deprived of the property he had bought, it was his own fault.

But it is said that a portion of the property was under attachment, at the time of sale. Will the fact that such property never came to the possession of the vendee, constitute a part failure of consideration for which the defendant would have a right to recoup in this action? It may be very doubtful whether the property was ever attached; if it was not, it was still in the possession of the plaintiff at the time of the sale; if it was attached, it was then in the hands of the sheriff. In either event, the *title* remained in the plaintiff only; in the latter case it was encumbered by the lien that attached in consequence of the levy.

Now, for a long time it was the doctrine of the common law, that a sale of personal property implied no warranty of title, but I think the modern doctrine is, that a sale of personal property by one in possession, (*aliter* if in the possession of another,) carries with it a warranty of title. It never was held, that I know of, that a sale in either the one case or the other, implied a covenant against incumbrances. (See *Chitty on Contracts*, p. 246, and authorities there cited.)

Thus, even if the property was in the hands of the sheriff, encumbered by the lien, the purchaser took at his risk, and is in the category of those to whom the doctrine of "*caveat emptor*" is intended to apply. The plaintiff is entitled to judgment for the principal and interest due upon the note—let judgment be entered accordingly.

In re. Vedder.

IN RE. VEDDER.

Sixth Judicial District Court, Oct., 1857.

PROBATE COURTS.

The provisions of the statute, authorizing probate judges to appoint guardians, are not in conflict with the section of the constitution vesting district courts with all the powers known to courts of equity.

The facts are sufficiently referred to in the opinion.

Smith & Hardy, for petitioner.

T. Conger, for the guardian.

BORTS, J.—This case comes up on a *habeas corpus ad subjiciendum*, in which the petitioner seeks to be restored to the custody of her infant female child, thirteen months of age. The return to the writ shows that the child is in the care and keeping of her grand-father, who has been appointed her guardian, with the right of custody, by the probate judge, for the county of Nevada.

The only inquiry proper to this proceeding is this—is the infant in legal custody? That the equity powers of this court extend to all questions of guardianship is, I think, hardly to be doubted. The sixth section of the 60th article of the constitution invests the district courts with all the powers known to courts of equity, and none of those powers are more thoroughly established than the full authority over the subject of the guardianship of minors. But it is the common law, and not the equity powers of this court, that are invoked by this proceeding.

The common law courts possess no power of this kind. They exercise no supervision over the subject of guardianship. It is true, that upon a writ of *habeas corpus*, a common law court, or a judge thereof, may inquire whether the prisoner is illegally detained, but they can go no further; if it appear that the defendant is in the custody of a guardian, appointed by the court of competent jurisdiction, the inquiry is at an end, and the defendant must be remanded. Up to this point the law is clear enough, and it would seem that its application to this case

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is not less apparent. But the counsel for applicant raises this grave question: Is not the statute conferring powers of guardianship upon the probate court, in opposition to that distribution of judicial powers established by the sixth article of our constitution? To sustain his position, he refers the court to the case of *Parsons vs. The Tuolumne Co.*, 5 Cal. 43. The Supreme Court in that case, undoubtedly, declared that the legislature can confer upon the county courts no jurisdiction over subjects included in the "general frame-work of courts of common law and equity." It is clear that the appointment of guardians was, by the common law system, vested in the chancery court, and that it is therefore by the constitution vested exclusively in the district court. If this were so, it would follow that the appointment of Vedder was a nullity, and as the only question to be determined on this application is as to the lawful right to the custody of the infant, and as the law unquestionably confers that right upon the mother, in the absence of the father, although equity may deprive her of it, it would follow, that it would be my duty to order the child into its mother's keeping.

But there are two answers to the argument of the learned counsel for the applicant: First, it does not appear that at common law the chancery court exercised the power of appointing guardians. Time out of mind, the chancery court of England exercised a supervisory power over the whole subject of infants and their estates; even to the removing of one guardian, perhaps, and the substitution of another; but the power of original appointment began to be exercised by the court of chancery in England, about the latter part of the reign of William III. (See *Reeve's Domestic Relations*, p. 316.) It is true that Chancellor Kent, in the 2d vol. of his *Commentaries*, p. 226, says: "the power of the chancellor to appoint guardians for infants, is a branch of his general jurisdiction over minors and their estates, and that jurisdiction has been long and unquestionably settled." But an examination of the earlier authorities to which he refers, will show, that they sustain the *supervisory power* only. At the common law, therefore, we hold that chancery exercised only a supervisory power, in its nature appellate, over the appointment of guardians.

But the constitution of California provides, that the county judge shall perform the duties of surrogate or probate judge. The term sur-

In re. Vedder.—Coffee vs. Meiggs.

rogate in England, is applied, I believe, to the deputy or vice chancellor of the ecclesiastical courts. The power of the ecclesiastical courts to appoint guardians to the persons of infants, has always been a bone of contention between those courts and the common law lawyers of England. But in Vermont, Massachusetts, Connecticut, New York, New Jersey, and probably in all the states where the term surrogate, or probate judge is used at all, the power of appointment is lodged with that officer. I take it, then, that when the constitution confers upon the judge of the county court, the powers of a surrogate, or probate judge, it intends that that officer shall exercise the power of appointing guardians to infants.

This is enough for the purposes of this case. The infant was in the lawful custody of her guardian—let her be remanded.

COFFEE vs. MEIGGS.

Twelfth Judicial District Court, October, 1857.

BREACH OF CONTRACT—DAMAGES.

Where a contractor is prevented by his employer from doing a certain act which he had contracted to perform, in an action by the former to recover the contract price, he is entitled to the whole contract price, if proof cannot be adduced to show what the cost or profit would actually have been.

Full reference to the pertinent facts of the case, is made in the opinion. On motion for a new trial.

J. Satterlee, for plaintiff.

S. M. Bowman, for defendant.

NORTON, J.—This action is brought by the plaintiff, Coffee, to recover the amount specified in a contract, made between him and the defendant, by the terms of which, Coffee was to make such alterations in the engine of a steam boat, belonging to defendant, that she would make twelve knots an hour. The nature of this alteration was not specified, being left entirely to the discretion of the plaintiff, who was to do something to produce the above result upon her speed, for attaining

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which end, he was to receive \$1000. It was in proof that the defendant interrupted Coffee in the execution of the contract, and prevented his terminating it.

Ordinarily, a person who contracts to perform a particular piece of work, such as the building of a house, the grading or paving of a street, or anything else, the cost of which can be ascertained, and who is prevented by his employer, doing or completing the work, is entitled to recover the profit he could have made. But in a case like the present, where no particular thing is contracted to be done, but only a result to be produced; where the mode and manner of doing the work, and the materials to be used, depend entirely upon the judgment and discretion of the contractor, and where his peculiar skill and knowledge, and personal handiwork, may be the main elements to be employed, and in consequence thereof it is impossible to prove by witnesses what the cost, or profit, would be, the rule of damages is the contract price, within the principle decided by the Supreme Court of this state, in the case of Baldwin vs. Bennett. 4 Cal. Rep. 392.

There might be some question whether the defendant was, or was not, justified in preventing Coffee from proceeding with the alterations, inasmuch as it appeared that the latter was about to destroy, or at least to injure, to a considerable extent, a valuable pipe, connected with the engine, but the jury were only asked to find upon the fact of interruption, the defendant declining to raise a question as to the right to interfere under the circumstances, and hence I cannot see any good ground for disturbing their verdict.

New trial denied.

OSGOOD vs. HAMILTON, EXR.

Twelfth Judicial District Court, October, 1857.

MOTION FOR A JUDICIAL RE-SALE.

Where property has been sold, under order of a court, to effect a partition of partnership assets, in which infant heirs are interested, a re-sale will not be ordered upon the offer of an advance of ten per cent. upon the amount brought by the property, if the transaction be free from fraud, surprise, or if the property has not been sacrificed.

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The necessary facts are stated in the opinion. On motion to open the biddings upon the sale of certain real estate, and for a re-sale.

Janes, Lake & Boyd, for plaintiff.

Daniel Rogers, (guardian *ad litem* for infant heirs) for defendants.

For the motion, D. Rogers contended :

1st. That, from the analogy of the law, providing for the setting aside sales by executors, it would seem that this court has the power of opening the biddings, upon an advance of ten per cent. beyond the price for which the property was sold.

2d. That, according to the English chancery practice, opening biddings is a matter of course, when an advance of ten per cent. is offered. (See 3 Daniel's Chancery Practice, 923, and cases there cited).

3d. That, inasmuch as the plaintiff was the purchaser, (his being the only bid,) and the defendants mostly infants, the present case calls for the interference of the discretionary powers invested in courts, exercising chancery power.

4th. That although the courts of New York have not adopted the English practice in opening biddings, yet, in extraordinary cases, they will do it. 2 *Paige's Chancery R.* 99 ; 3 *Johnson's Chancery R.* 290 ; 13 *Wendell's R.* 224.

D. Lake, opposing the motion, argued :

There are not many reported cases to be found, in either the English or American books, where judicial sales are sought to be opened.

The cases in which such practice most usually occurs, are cases of probate sales. And in them, the practice is usually founded on some express provision of the statute regulating such sales, as in our own state. (See Comp. Laws, page 401 § 119.) The rule in these cases is absolute and certain. No discretion is left in the court.

We do not find in the books any reported cases of application to open a partition sale. We can only assume that the power of the court is analogous to that exercised in mortgage cases.

It is undeniably the practice in England to open biddings at master's sales, prior to a confirmation, and sometimes even after confirmation. In the first case, upon a mere advance upon the former bid, and in the

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second, upon such advance, and some circumstances showing surprise or mistake, or fraud.

The manner of conducting the sale in England is very different from ours, and opening the biddings is as much a part of the machinery of a judicial sale there, as is the making of a deed to the purchaser. For description of both the English and American modes of making sales, by the master, see remarks of senator. Mason, in the case of *Collier vs. Whipple*, 13 *Wend. p.* 233.

The English practice has never been followed in this country.

Mere inadequacy of price is not here deemed a sufficient ground for opening a sale.

See *Williamson vs. Dale*, 3 *Johns, C. C.* 290 ; *White vs. Floyd*, 1 *Spier's Eq. R.* (New Jersey) 355 ; *Dunear vs. Dodd*, 2 *Paige C. R.* 99 ; 2 *Hoffman's Ch. Prac.* 146 ; *Young vs. League*, 1 *Bailey's Eq.* (So. Carolina) 17 ; *Dick vs. Cooper*, 24 *Penn.* 222 ; *Wertzel vs. Fry*, 4 *Dall.* 218 (2d Ed. p. 209 ;) *Glenn vs. Clapp*, 11 *Gill and J.* 1 (Maryland :) *House vs. Walker*, 4 *Md. Ch. Decis.* 62.

We further contend, that this is a statutory proceeding, and that no provision is made in the statute for opening the sale. The sale is to be to the highest bidder, at the time and place contained in the notice. See practice act, § 287.

The only ground for refusing a confirmation of the sale, to be found in the statute, is contained in § 295, of same act, and that is not this case.

NORTON, J.—In this case certain real estate, in the city of San Francisco, was sold under an order of the court, to effect a partition. Some of the parties in interest are infants. The property sold for \$15,000, and since then, responsible persons have offered to bid \$17,000, in case a re-sale is ordered, for which a motion is now made.

In England it is the custom to open the bids, in case an advance of ten per cent. is offered. In this country, the courts have refused to adopt this custom, and it seems for good reasons. (*Duncan vs. Dodd*. 2 *Paige*, 99 ; *Collier vs. Whipple*, 13 *Wend.* 232.) In case of fraud or surprise, or where the property of infants had been manifestly sacrificed by the neglect of their guardians, relief may be granted, but this is not a case of that kind.

Motion denied, and report of sale confirmed.

Hovey vs. Whitman.

HOVEY vs. WHITMAN.

Sixth Judicial District Court, October, 1857.

MANDAMUS.

A state court will not grant a mandamus to a state officer, to settle claims against the state.

The facts are stated in the opinion.

Latham & Sunderland, for plaintiff.

Defendant not represented.

BORTS, J.—This is another petition for a mandamus to the controller of state. Nobody appears upon the part of the state, and I am asked to take as confessed, the allegations of the petition; supposing they are all true, I shall deny this application.

The petition alleges, that by the appropriation act, of 1856, the sum of three thousand dollars was appropriated to defray the expenses of translating the laws; that one Eldredge, was selected for the performance of this duty, by a joint committee of the two houses; that by the authority of said committee, Eldredge proceeded to translate into the Spanish language, the laws of 1856; that he completed the work as soon as possible, and delivered it to the secretary of state, on the 8th day of May, 1857, presenting, at the same time, to that officer, a bill against the state, for the sum of six hundred and twenty-three dollars, for such translation; that such claim of Eldredge was afterwards presented to the board of examiners, and by them approved; that Eldredge, for a valuable consideration, assigned said claim to the petitioner; that petitioner presented said claim to the controller, who rejected it, and the petitioner concludes with a prayer for a mandamus, compelling the controller to draw his warrant on the treasurer for the amount of said claim, it being alleged that an amount sufficient and applicable to the payment of said amount, is lying in the treasury.

The state of California has heretofore declined to invest her judicial tribunals with authority to decide upon claims preferred against her. Indeed, the constitution expressly provides for the election of an officer, to whose arbitrament such claims shall be submitted, and there is no

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provision for an appeal from his decision. By the law of 1856, creating the board of examiners, the power of the controller to pass an account, is curtailed, but his power to reject is as potent as ever. The only appeal I know from the decision of a state controller, lies to the legislature, or to a special commission, created for the purpose, by legislative enactment, as the court of claims established by the general government.

The application is denied.

HARNEY vs. RYAN.

Sixth Judicial District Court, October, 1857.

EJECTMENT.

The defendant, in ejectment, cannot set up an outstanding title against a plaintiff, who proves a prior possession.

The requisite facts are referred to in the opinion.

_____, for plaintiff.

_____, for defendant.

BOTTS, J.—This is an action of ejectment. The defendants went into possession of the premises in controversy, under a purchase at a sale made by virtue of an execution issued out of the superior court of the city of San Francisco, in a suit in which Wethered, the plaintiff's grantor, was defendant. It is admitted that the sale was a nullity, and that Wethered had no title to the property. Can the defendant, who paid the purchase money, set up the outstanding title, by way of defense, to this action?

In my opinion, this case turns upon a point that was not distinctly settled, between counsel, on the trial, the proofs, consisting only of verbal admissions of counsel, a very loose and objectionable mode of proceeding. I allude to the fact of prior possession of Wethered. The sale is a nullity; there is no privity between the defendants and the

NOTE.—We regret that we are unable to furnish the names of the counsel who argued this case.

Harney vs. Ryan.—Haskell vs. Cornish.

plaintiff's grantor; they are entire strangers; the only supposed link is repudiated by both; consequently, there can be no question of estoppel. A stranger, without either paper title, or prior possession, cannot eject the defendant. His possession protects him. On the other hand, the defendant, in ejectment, cannot set up an outstanding title against a plaintiff, who proves a prior possession. *Winans vs. Christy*, 4 *Cal. Rep.* 70.

Since, then, the plaintiff has failed to establish, either a paper title or prior possession, I shall render judgment for defendant, with leave to the plaintiff to open the judgment, if he desires to establish the fact of prior possession in his grantor.

HASKELL vs. CORNISH.*

Twelfth Judicial District Court, October, 1857.

PROMISSORY NOTE.

In an action on a promissory note, against the makers thereof, where the note was given to a person to procure the signature of a third party, and was then to be delivered as the note of an association, the plaintiff cannot recover, unless he can show either that he came into possession of it for a valuable consideration, or that the makers expressly recognized it, and against such the verdict may stand.

The material facts are fully stated in the opinion. On motion for a new trial.

G. P. Fobes, for plaintiff.

J. D. Creigh, for defendant.

NORTON, J.—This is an action founded on a promissory note, made by the defendants, in which the defense set up is that the note is not an individual promise, but was signed by them as trustees, and on behalf of an association, The First African Methodist Episcopal Church. It appeared that Cornish and Lewis executed this note as trustees of this association, and on behalf of the whole board, and that they then delivered it to one Harris, who was to have obtained the signature of

* See ante, p. 112.

Haskell vs. Cornish.—White vs. Morse.

another member of the board previous to the delivery of the note. This he failed to do, and the plaintiff, in whose possession it now is, brings this action upon it, against the two makers whose names appear.

After it came into plaintiff's possession the defendant, Cornish, saw it and remarked, "it's all right," or something to that effect. Lewis does not seem to have seen or recognized the note, in any manner, after its delivery to Harris. There is no proof, as far as he is concerned, that would raise the presumption of an implied assent on his part, for it is not shown that he ever saw the note, or heard, or knew anything about it after Harris took it for the purpose mentioned. The plaintiff introduced no evidence to prove that he was an innocent purchaser, that he came into possession of it in the regular course of trade, or that he received it for any valuable consideration whatever.

Inasmuch as the defendants did not intend that the note should be delivered until after the signing by their co-trustee, I should hold, in the absence of all proof that the plaintiff actually was a *bona fide* innocent purchaser, that he would not be entitled to recover unless it could also be shown that the defendants had, in some manner, manifested their acquiescence in the form of the note, in its present condition.

There is proof of this character, as already stated, against one of the defendants, but none against the other. If the verdict had been against both, as I at first supposed, it would have to be set aside; but as it was only taken against Cornish, it may stand.

WHITE vs. MORSE.

Twelfth Judicial District Court, October, 1857.

LETTERS TESTAMENTARY, AS EVIDENCE.

Letters testamentary are *prima facie* evidence of the decease of the party to whose estate they refer, and that he died within the proper county to give the court jurisdiction.

On motion for a new trial. The necessary facts are set forth in the opinion.

W. W. Crane, for plaintiff.

White vs. Morse.—People vs. Corse.

J. P. Treadwell, for defendant.

NORTON, J.—This action is brought against the defendant, Morse, by the executor of the estate of one O. B. White, deceased. On trial the letters testamentary were introduced, but there was no evidence, either of the death of the party, or that his decease occurred in this county. The introduction of proof upon this latter point I held at the time to be essential to the plaintiff's case, in order to show that the court had jurisdiction; and in the absence of any evidence upon this point, plaintiff was non-suited. An examination of the authorities has, however, shown that the contrary seems to be the well established doctrine, and that the letters testamentary are, of themselves, *prima facie* evidence of the requisite jurisdiction, which, in the absence of proof to the contrary, must be held to be conclusive. This ruling also appears to me to be the more reasonable and proper one of the two.

The papers were in this case introduced by the defendant himself, to show the fact that the bond had never been approved, because no approval is endorsed on the bond. But I do not think that this countervails the presumption arising from the issuing of the letters, if indeed it is a matter going to the jurisdiction at all.

New trial granted.

PEOPLE vs. CORSE.

Fourth Judicial District Court, October, 1857.

MOTION TO QUASH AN INDICTMENT.

Where a defendant is not held to answer before the finding of the indictment, he may move to set it aside on any ground which would have been good cause for challenge, either to the panel, or to any individual grand juror.

Where the number of names required by the act regulating criminal proceedings, from which the grand jury is to be drawn, are not placed in the box, it would afford a good ground for challenge to the panel, and would therefore be sufficient to quash an indictment.

The panel list required to be signed by the county judge, sheriff, and county clerk, does not comply sufficiently with the statute when signed by the judge alone.

The facts upon which this motion is founded, are sufficiently stated in the opinion.

People vs. Corse.

W. K. Osborne, District Attorney.

James, for prisoner.

HAGER, J.—Motion is made to set aside this indictment, on the ground of informality in the drawing of the grand jury. It not appearing that the defendant was held to answer before the finding of the indictment, he may move to set it aside on any ground which would have been good cause for challenge, either to the panel or to any individual grand juror. C. Laws, p. 458, § 279.

By the minutes and records of the court of sessions, it appears that but forty-eight names were copied from the assessment roll from which the grand jury that presented this indictment were drawn, and the list of the names placed in the box, and those drawn, is signed only by the county judge, when our statute (C. Laws, p. 353, § 5) requires that fifty names shall be placed in the box, from which the county clerk, in the presence of the county judge and sheriff, shall draw the names of twenty-four persons, to serve as grand jurors, and that a correct list of the names placed in the box, and those drawn, shall be kept, and certified by the judge, clerk, and sheriff, and filed in the clerk's office.

In drawing the grand jury the essential requirements of the act have not been complied with; fifty names should have been placed in the box, and the list and certificates should have been signed by the three officers, judge, clerk, and sheriff, and the signing of the one is insufficient. It is to be regretted that the officers appointed to perform the important duty of drawing and forming a grand jury, did not exercise more care and diligence in following the plain letter of the law. It is due to the county judge to say, that the certificates were properly signed by him, and that he has given information to this court that the imperfection in the list of names was an error in the person who made the copy. For the negligence of the other two no excuse appears.

The objection of the defendant, in my opinion, is well taken, and it would have been a good cause of challenge to the panel in the court of sessions, under § 182, of the criminal code. The indictment must be set aside. The defendant, however, is not discharged—the case must be re-submitted to the grand jury—and if defendant has been admitted to bail, or deposited money instead, the bail or money must be answerable for his appearance to answer a new indictment.

D'hondt vs. Bongard.

D'HONDT vs. BONGARD.

Sixth Judicial District Court, October, 1857.

POSSESSION—EJECTMENT.

Actual possession of a portion of real estate, with color of title, will sustain ejectment for the whole tract described in the colorable title.

A grant of the Governor of California is such a colorable title.

The facts are set forth in the opinion.

Latham & Sunderland, for plaintiff.

Crocker & McKune, for defendant.

BOTTS, J.—This is action of ejectment, brought to recover the possession of lot No. 2, in the square between R and S, Front and Second streets, in the city of Sacramento. A jury having been waived, the case was submitted to the court.

I have decided that the deposition of Vioget, taken in the suit of Brannan vs. Wiley, offered by the plaintiff is inadmissible, both because of the irrelevancy of the matter deposed to, and because it was evidence taken *in re inter alios acta*.

The case then rests upon the original petition of and grant to, John A. Sutter, the *mesne* conveyances from Sutter to the plaintiff, and the depositions of Sutter and Fowler, together with admissions made by counsel in open court, upon the day of trial.

I find, as matter of fact, that Exhibit 3 $\frac{1}{2}$, is a correct translation of the petition presented by Sutter to Juan B. Alvarado, Governor of California, on the 15th day of June, 1851. Exhibit No. 4, is a correct copy of the original grant to Sutter, made in compliance with said petition; that the map marked Exhibit 4 $\frac{1}{2}$, is a correct copy of the map accompanying the original petition, and referred to in the petition and grant; that the plaintiff exhibits a perfect deraignment of title from Sutter; that Sutter and his grantees, since 1841 have had an actual and unbroken possession of a portion of the land contained in the limits of his grant; that the lot in controversy is within the limits of said grant, and that the defendant is in possession of the premises in dispute.

D'hondt vs. Bongard.

Upon these facts I adjudge, as matter of law, that the plaintiff is entitled to a judgment for the possession of the premises described in the complaint, and his costs of suit.

This is a most important case, and one on which I have bestowed the most profound consideration. The doctrine that an actual possession of a part, with color of title, will sustain ejectment for the whole tract described in the colorable title, has been settled for me by the Supreme Court, in *Gunn vs. Bates & McCartney*, decided July term, 1856. Nay, more, that case relieves me from the embarrassment of determining whether this incipient step towards the acquisition of title—the grant of the Governor of California—is color of title, since Sheldon's title, upon which the action in that case was maintained, is identical with Sutter's, which is the foundation of this. So far, then, the way had been paved before me, and the road was easy enough.

But it is contended by the defendants, that the boundaries of the grant include neither the place known as "Sutter's Fort," of which it is admitted Sutter had actual possession, nor the land in controversy; and it must be admitted that the terms of the grant are vague and uncertain enough to leave some room for doubt. But after much consideration, I cannot but think that there is a decided preponderance of reason in favor of the interpretation that extends the grant to all the land delineated upon the map which accompanied the petition; or I would rather say, the right of selection of the eleven leagues vested in Sutter by the grant, embraced all the land delineated upon the map; and this right of selection as against others than the Government or its grantees, has been held equivalent to a grant.

It is true, that the grant in one, specifies as a southern boundary the line of latitude 58 degrees, 49 minutes and 32 seconds, and this line, it is admitted, is several miles north, both of Sutter's Fort and of the premises in controversy; but I am inclined to think that the boundaries specified in the third section of the grant are not intended as the boundaries of the grant, so much as a description of the main features and boundaries of the map according to which the grant is made.

It will be perceived from an interpretation of the third section, that the term "*sus linderos*," its limits, marks or boundaries, may apply as well to "*el diseño*," the map, as to "*el terreno*," the land; indeed, of the two names, the former is nearer to the possessive pronoun whose

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antecedent is the point in question. Now let us look to the other portions of the grant, and the surrounding circumstances, to assist us in solving this doubt.

Sutter presents his petition, in which he solicits eleven leagues of land, to be selected from the territory included in the map annexed to his petition. In reply, the Governor states that he has examined the map: that it includes no land previously appropriated, and is, therefore, all subject to grant, and he concedes the prayer of the petition. Upon confirmation by the Junta Department, he says that the proper officers will proceed to segregate the eleven leagues, and put the petitioner in possession. The land intended to be granted, says he, amounts to eleven square leagues, to be selected from that portion of country included in the accompanying map, the limits or boundaries of which are as follows, viz: " 'Los tres Picos,' and latitude 39 deg., 41 min., 45 sec. on the north; the borders of Feather River on the east; latitude 38 deg., 49 min., 32 sec. on the south, and the River Sacramento on the west." Now, upon an examination of the map, of which we take this to be intended as a description, we find that its prominently marked features are "Los tres Picos," and a line of latitude in the upper part; the Feather River the most eastern object; the Sacramento the most western, and a certain line of latitude the most southern.

The line of latitude in the north, which, neither in the grant or on the map purports to be the line of the Three Peaks, on the copy of the map in evidence, is without the figures that probably appeared in the original. In the grant they are designated as 39 deg., 41 min., 45 sec., and this, it is admitted, is about a correct designation of the line appearing on the map. In this connection it is to be observed that this line on the map, stops short of the meridian of the "Three Peaks," which lie considerably south of it, but which are the most northern object designated on the map, west of the point where the line of latitude terminates. Hence, in a description of the map, the northern limits are said to be the "Three Peaks," and the line of latitude, 38 deg., 49 min., 32 sec. As anything else than a description of the map, this would be an absurdity. How could a northern boundary of a tract of land be a line of latitude and a point south of that line? The fact that the line of latitude delineated on the map stops

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at a point east of the Peaks, and the supposition that the grantor is describing the objects delineated in the northern part of the map, make this otherwise absurd expression, perfectly intelligible. Again, he says the Feather River lies on the east, the Sacramento on the west. This is the relative position of these rivers as they are represented on the map. The Feather river is the most eastern, the Sacramento river the most western, object delineated. As boundaries of the tract intended to be granted, this description would be impossible, because it is admitted on all hands, that the line of latitude intended as the southern boundary of the tract, lies south of the junction of these rivers. Thus, whilst these terms answer well enough as a rough description of a rude map, they are contradictory and impossible, if considered as designating the boundaries of the grant.

Up to this point, every consideration leads to the conclusion that the Governor intended to adopt the map as descriptive of the limits within which the eleven leagues were to be selected, and that in the third section of the grant, he merely attempts to describe the northern, eastern, and western features of the map. Now, how is it with the southern line? In the third section it is described as the line of latitude, 38 deg., 49 min., 32 sec. On looking at the map, we find at its southern extremity a line marked "lindero 38 deg., 41 min., 32 sec." The two sets of figures differ only by a single stroke of the pen. Out of six figures, five agree exactly. If the one is not an attempted copy of the other, this is a singular coincidence, to say the least of it. But again, Sutter, in his petition, states that with the leave of the government, he has already established himself in the territory for which he seeks a grant, and that he calls his establishment "New Helvetia." On the map we find the conventional figure of a fort, and the words "Establa de Nueva Helvetia," written under it. The line of latitude designated as the southern boundary in the third section of the grant, would exclude the fort or establishment of New Helvetia from the grant, whilst the line at the southern extremity of the map marked "lindero," would include it.

Now with all these facts before us, shall we determine that it was the intention of the grantor to fix, without any apparent reason, as the southern boundary of this grant, a line of latitude which would exclude the well known home of the petitioner—his fortified domicil—

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the establishment on which he prides himself—making it the foundation of his claim to the favorable consideration of the government ; or shall we adopt that construction which is so natural, so probable, and which gives him for his southern boundary, the line marked as *lindero* on the very map referred to, and adopted by the grantor ? For my part, I cannot hesitate a moment in determining that the third section of the grant, is intended merely as a description of the outlines of the map, and the southern boundary is misdescribed by a single figure—an error which is corrected by a reference to the map itself, made a part of the grant.

It is for these reasons that I find, as a mixed question of law and fact, that the plaintiff's grantor was in possession of a part, with color of title to a tract of land in which the premises in controversy are included.

Let judgment be entered for the plaintiff.

PHELAN vs. WHITMAN.

Sixth Judicial District Court, October, 1857.

MANDAMUS.

Courts will not, by mandamus, interfere with the acts of an executive officer, unless the act commanded by law is so simple and so clearly defined, as to take away all discretion, and make obedience a mere ministerial act.

Executive officers, being liable on their official bonds, to those who may be damaged by their misconduct, they should be allowed, in cases admitting of doubt as to the construction of the law governing their acts, to put their own construction upon it, and abide the consequences.

The pertinent facts are set forth in the opinion.

———, for plaintiffs.

———, for defendant.

BORTS, J.—This is an application for a mandamus, to be directed to the Controller of State, commanding him to issue his warrant in favor of plaintiffs, for the several sums of \$447 99-100, claimed to be due them respectively from the State of California.

Phelan vs. Whitman.

The case comes up on an agreed statement of facts. No objection is taken, either by demurrer or plea, to this extraordinary joining of the parties plaintiff.

The only facts amongst those admitted, that seem to me to bear upon the question at issue, are the following: The petitioners are clerks in the office of the Treasurer of the State of California, appointed, Phelan on the 20th day of February, 1857, and Potter on the 24th day of February, 1857. By an Act of the Legislature, passed, April 21st, 1856, the pay of the clerks in the Treasurer's office was reduced from \$270 to \$200 per month. The sixth section of this law reads as follows:

"This Act shall not be held to reduce the salary or pay of any of the incumbents now in office, who shall for their present term receive compensation at the rates now prescribed by law, but shall apply to every such officer hereafter elected or appointed."

By an Act of April 30th, 1857, an appropriation was made of \$2,160, to pay the clerks in the Treasurer's office. This sum divided amongst these clerks, would pay them exactly \$270 per month.

If the accounts of the plaintiffs are audited at the rate of \$270 per month, it is agreed that the said sum of \$447 99-100 is due them.

In deciding this case, I will take occasion to remark, that it is a very delicate question to determine, whether the duty and responsibility of auditing the accounts of those having claims upon the public treasury, is not devolved by our political system, exclusively, upon the Controller of State; whether the courts, by mandamus, can do more than set this officer in motion without pretending to control or revise his official action. It may be very convenient for these officers to procure the assistance of the courts in the solution of doubts as to their official acts, but they should pause to inquire whether a mandamus would protect them and their bondsmen, from the effects of official misconduct.

The extreme verge to which courts have ever gone in relation to the acts of executive officers, is to declare that where the act commanded by law is so simple and clearly defined as to take away all discretion, and make obedience a mere ministerial act, the courts will, by mandamus, compel its performance. It is sometimes very difficult to distinguish between those cases which leave room for the exercise of discretion, and those in which the act to be performed is merely ministerial.

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Indeed, it is clear, that in determining this very question much will depend upon the peculiar views of him who is called on to decide it. What may appear a clear, simple and unmistakable command to one mind, may furnish room for doubt, difficulty and the exercise of discretion to another. For instance, this question will always occur in such a case as the present. To audit accounts against the State is the duty of the Controller; it can in no way be called a judicial function. Laws are passed to guide the Controller in auditing accounts. They are commands of the Legislature directed to this officer, intended to govern him in the discharge of his official duty. Is it not his duty to construe them? Are not he and his bondsmen responsible for his obedience to them? Suppose I should command him to do that which, hereafter, upon a suit upon his bond, this court, upon better advisement, should consider a breach of his official duty, would such an order protect him? This is a matter worthy of grave consideration, because the question of protection is clearly the test of authority. It cannot be that the law can compel an action for which the law can demand a forfeit.

In this case I am relieved from the necessity of doing more than throwing out doubts and hints upon this subtle point; because, upon the merits of this particular case, without regard to the general question, I am prepared to deny the application for a mandamus.

The law of 1856, reducing the salary of the clerks, is, in its terms, clearly applicable to the plaintiffs, they not being incumbents then in office, but being appointed after the passage of the Act. The only question, in truth, that it is proposed to raise by the terms of this submission, is, does the appropriation made by the bill of 1857 virtually repeal the reducing Act of 1856? I answer, emphatically and confidently, that no positive statute can be repealed by an implication so loose as this. The presumption that the Legislature of 1857 overlooked the statute of 1856, is just as reasonable as that they intended to repeal it.

The application for a mandamus is denied.

WAGONBLAST vs. WASHBRIM.

Sixth Judicial District Court, October, 1857.

DESCRIPTION IN MORTGAGE.

The description in a mortgage of the property thereby encumbered, must be sufficient independently of anything *dehors* the mortgage to apprise a subsequent mortgagee of the same property, of the intention of the parties to the first mortgage, to charge the identical property; but the description must be fairly construed, and it is sufficient if the thing intended is clearly pointed out to a man of ordinary understanding, no matter what language may be employed.

The facts are stated in the opinion.

Winans & Hyer, for plaintiff.

Clark & Gass, for defendant.

BOTTS J.—An action of ejectment—jury waived, and facts as well as law submitted to the court.

In this case I find as matter of fact, that Hein and wife, being the owners of a portion of lot No. 1, in the block between 3d and 4th and K and L streets, in the city of Sacramento, executed a mortgage on the 21st day of April, 1853, to the defendant. In that mortgage the property conveyed is described as follows:

“Situate, lying and being in the city of Sacramento, and described on the map of said city as part of lot No. 1, in the square between K and L and 3d and 4th streets, bounded as follows: commencing at a point 60 feet west of the corner of K and 3d, running thence east on K street 20 feet, thence southerly 90 feet, thence westerly 20 feet, thence northerly 90 feet to the place of beginning.”

This mortgage was duly recorded on the 22d day of April, 1853. On the 24th day of September, 1853, said Hein and wife executed a mortgage of the premises in controversy to one Noonan. The mortgage was duly recorded. Afterwards, on the 3d day of December, 1853, the said Hein and wife mortgaged the premises in controversy to J. J. Chauviteau.

In May, 1855, the defendant filed a bill in this court making Hein and wife, and Noonan, parties, in which she alleged that the premises

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mortgaged to her by Hein and wife, although misdescribed, were in fact the premises in controversy, praying a decree of foreclosure and sale of said premises. On the 22d day of June, 1855, decree entered accordingly. The defendant purchased and entered under this sale.

Chauvitau assigned to Wagner, and Wagner to Shaffer. Shaffer on the 7th day of March, 1856, filed a bill of foreclosure, to which neither the defendant nor Noonan were parties. Decree of foreclosure accordingly and sale, at which Shaffer became the purchaser and finally received the Shaffer deed. Shaffer afterwards conveyed by deed to the plaintiff. Neither Chauvitau nor his assignees had any notice of the prior mortgage of the premises, except that furnished by the record of the mortgage to the defendant.

An examination of the map of the city referred to in the defendant's mortgage, shows that the premises in controversy are, in fact, situated in the northeast corner of lot No. 1, with a front of 20 feet on K street, being 90 feet deep. The same lot would be perfectly described in the mortgage to the defendant by substituting east for west in the description of the initial point. To run west from the corner of K and 3d would be to run into 3d street, as it is laid down on said map, and the description of the lot, literally construed, would place it wholly in 3d street.

To my mind, these facts present only one question, but that a very embarrassing one, because, after a careful examination of the numerous authorities furnished me by counsel, I have found none exactly in point. The question is, is the description in the mortgage to the defendant sufficient to apprise a subsequent mortgagee, without any matter *dehors* the mortgage itself, of the intention to convey the premises in controversy? Chauvitau is supposed to have been possessed of all the information that is to be drawn from the words of the prior mortgage, and an examination of the map to which it refers. The description of the property intended to be conveyed is to be construed, and fairly construed, by subsequent purchasers, and as the only use of language is to convey ideas, it is sufficient, no matter what language is used, if the thing intended is unmistakably pointed out to a man of ordinary understanding. Now, is there any reasonable man, who, looking at the map to which he is referred, would not say when he is told that the lot intended is part of No. 1, and is directed to begin at the corner

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of 3d and K, and run *west*, which carries him straight into 3d street, is there a reader of ordinary understanding that would not say at once, here is a clerical error, the grantor meant east instead of west? I think not. I think the error is one that is patent upon the face of the deed, and could mislead nobody.

I hold, therefore, that Chauvitau had notice of the prior mortgage of the defendant, and, consequently, that the plaintiff's grantor got nothing by his purchase.

Let judgment be entered for the defendant.

RICHARDS vs. SCHROEDER.

Twelfth Judicial District Court, October, 1857.

CHATTEL MORTGAGE—DELIVERY.

In the case of a mortgage of personal property, a delivery of the property is necessary to its validity, as against a third person.

But in case of a bulky article, such as a kiln of brick, a removal of the property is not necessary, provided there is an actual delivery of the property, symbolical, or otherwise.

This is an action of replevin, brought to recover possession of a kiln of bricks, which was referred, by consent of counsel, to a referee, who found, as matter of law, that defendant was entitled to a judgment in his favor. Plaintiff's counsel now moves to set aside the report of the referee, for error, upon the facts, as found by him. The important facts are sufficiently set forth in the opinion.

J. Reynolds, for plaintiff.

J. McCabe, for defendant.

NORTON, J.—The defendant, as constable of one of the justice's courts of this city, seized, by virtue of an attachment issued therein, in an action in which one Loring was defendant, the kiln of bricks, which forms the subject of this controversy, as the property of the said Loring. He, however, had previously given a bill of sale of the same, to this plaintiff, in the nature of a mortgage, to secure him in the pay-

Richards vs. Schroeder.—Luning vs. Brady.

ment of a debt of \$500, which Loring owed him, and which one Webster, who held the goods to sell, on the account of the former, promised to pay. The referee found that there was no change of the possession of the property. By this he apparently meant, that the bricks were not actually removed from the yard, where they lay in the charge of Webster. In this case, such a delivery would not be necessary, it being sufficient that it should be symbolical merely, but it does not appear that anything of this kind was ever done. This being the case, Webster remains in possession as bailee of Loring, and not of this plaintiff, who, therefore, is not entitled to maintain this action.

The motion is denied, and the report of the referee confirmed.

LUNING vs. BRADY.

Twelfth Judicial District Court, October, 1857.

CERTIFICATE OF ACKNOWLEDGMENT.

Where the certificate of acknowledgment, by the husband and wife, attached to a mortgage, misnames the husband, but describes the wife by her true name, and states that she is known to the officer giving the certificate, to be the person who executed the mortgage, the defect of describing her as the wife of the misnamed husband, is not fatal to the validity of the certificate, as far as concerns the wife, and if the error, as far as affects the husband, be obviated by a new certificate, made on proof, by a subscribing witness, the proof of acknowledgment is sufficient.

The material facts are stated in the opinion. On demurrer.

S. M. Bowman, for plaintiff.

McDougal & Sharp, for defendant.

NORTON, J.—This action is instituted to foreclose a mortgage, executed by the defendant, and his wife; but there is a slight difficulty, which presents itself on account of an error in the certificate of acknowledgment of this mortgage, arising from a misdescription of the husband. His true name is Thomas Brady, while the certificate of acknowledgement describes the parties as “Joseph Brady, and Josephine, his wife.”

Luning vs. Brady.—Dana vs. Stanford.

The error, so far as it affects Brady, the husband, has been obviated by a new certificate, made on proof, by a subscribing witness.

But it is urged, that the description, in the first certificate, is defective as to the wife, that is, it describes her as the wife of Joseph, whereas in the mortgage it appears that she is the wife of Thomas. I think, however, this is not a fatal circumstance, as she is otherwise sufficiently described by her own name, and as being known to the officer as the person described in the mortgage. It is also objected, that the husband and wife should acknowledge at the same time, that is, that there should be one certificate which is good as to both. I can see no sufficient ground for this objection. The statute requires the wife to make her acknowledgment separate from her husband. It is sufficient that he has assented to her execution of the mortgage, by himself being a party to it.

Demurrer overruled.

DANA vs. STANFORD.*

Twelfth Judicial District Court, October, 1857.

ASSIGNMENT—MORTGAGE.

Where an insolvent debtor mortgages all his property to one of his creditors, in order to secure the latter in the payment of his debt, and also to pay off the debts of other creditors, for which he is liable as endorser, the transaction is not an illegal assignment under our insolvent law.

The facts of this case are substantially as follows: Deitz, a merchant in the camphene and turpentine business, finding himself in failing circumstances, executed a *mortgage* of all his personal property to Stanford Bros., and transferred to them the possession. The terms of the mortgage were, that the mortgagees should sell the property with reasonable diligence, and should pay themselves with the proceeds to the amount of various debts which Deitz owed them, and which were then due, and also including sundry endorsements, executed by the Stanfords, for the accommodation of the mortgagor, which notes were not yet due, but which the mortgagees paid upon maturity. Since the

* See ante, p. 182.

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transfer of the property the mortgagees have continued the business in which Deitz was engaged, but have kept the accounts of the sales of the various portions thereof, distinct from their own private accounts current, and have also kept separate from their own goods the property itself.

This action is brought by W. A. Dana, one of the other creditors of the insolvent, to set aside this mortgage, on the ground of its being such an assignment of his property, by an insolvent debtor, as is void under our law, as settled and declared by the Supreme Court of this State, and then to apply the necessary portion of the proceeds of the property, now in the defendant's hands, to the liquidation of plaintiff's debt.

S. M. Bowman, for plaintiff.

Crockett & Page, for defendant.

The case was tried by the court, without a jury.

NORTON, J.—The ground upon which this action, to set aside this mortgage, is founded, is, that under cover of the mortgage, Deitz had made an assignment in fact of all his property, to the defendants, and with the intent to hinder and delay other creditors. As far as the instrument by which the right of possession of the property is conveyed, shows on its face, it is a mortgage, in the strictest sense and definition of the word, and is not an assignment. It is too well settled to admit of discussion that, in the absence of any statutory prohibition, a party, when in failing circumstances, may either pay any creditor or creditors whom he may elect to prefer, or he may give them such security for the liquidation of their demands, as lies within his power. The fact that the mortgagee, in this instance, is to sell the property which has been placed under his control, to secure him in the payment of his debt, in no way injures or affects the legal force and effect of the mortgage itself. The mortgage leaves the general right of the property in the mortgagor, and merely subjects the property to a lien for the amount which the instrument expresses. The creditor plaintiff, Dana, may buy the equity of redemption of the insolvent, which exists necessarily, from the very nature of a mortgage, and may appropriate it toward the payment of his debt.

Dana vs. Stanford.—Calvary Church vs. McKee.

The same question has arisen in this case that was mooted in the case of McKenty vs. Gladwin, Hugg & Co.,* that is, that the mortgage, by its terms, authorizes the mortgagees to appropriate a sufficient portion of the proceeds of the stock, to the liquidation of debts to become due after the execution of the mortgage itself; that is, the indebtedness which would arise from Deitz to the mortgagees, upon the payment by the latter of various notes of the former, on which they had become endorsers.

I held in that case, and having seen no reason to alter the conclusion to which I then came, I shall hold now, that that circumstance alone does not invalidate the transaction. In this case Stanford Bros. are undoubtedly accountable to Dana, and the other creditors of Deitz, for all the proceeds which they may realize upon the property, by which they have been secured, over and above the amount of their debt and liabilities; and in an action against them for such surplus, the plaintiffs would clearly be entitled to recover, and possibly might compel them to account for any profits made by using the property instead of selling it. On the whole, however, I can see no good reason why this mortgage should be disturbed.

CALVARY CHURCH vs. McKEE.

Twelfth Judicial District Court, October, 1857.

CONSIDERATION.

A. executes and delivers to a church society a promissory note, on the representation, by a trustee, that the same can be credited upon the sum paid for pews. The trustee had no authority to make the representation, and the church never having adopted or confirmed it, would not have been bound thereby. *Held* that the promissory note was made without consideration, and therefore void.

The principal facts of this case are briefly as follows:

At a meeting of the members of Calvary Church, holden May 1, 1856, one of the trustees represented that the church was in want of

* See ante, p. 123.

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funds, and donations were asked. Among others defendant executed a promissory note for \$500, payable January 12th, 1857, with interest, and delivered the same to one of the trustees. It further appeared that the member making the announcement at the meeting in question, stated at the same time, that those persons who should make donations would be entitled, at the sale of pews, (to take place soon afterwards,) to credit these amounts in part payment for the same; but no evidence was adduced to show that the trustee was authorized to make this assertion, or that the church ever adopted or confirmed it any manner, express or implied. On the 1st of August a public sale of pews was held, at which McKee became a purchaser, and paid a premium over and above the amount fixed by the trustees, and had taken possession of the pews.

This action is brought on the said note to recover the amount thereof. The case was tried before a jury, and a verdict given for plaintiffs. This is a motion for a new trial.

W. K. Osborn, for plaintiffs.

J. D. Creigh, for defendant.

Who, in support of the motion, argued,

First—That the note was but *nudum pactum*, citing, 3 *Bos. & Pull.*, 249; 7 *Johns.*, 26; 16 *Johns.*, 233; 18 *Johns.*, 148; 1 *Comst.*, 582; 3 *Comst.*, 93, 107, 112; 11 *Mass.*, 19; 1 *Com. Dig.*, 24.

Second—That there was no contract on the part of the trustees to give, nor on that of McKee to take; therefore the declarations of a trustee at a public meeting were void, referring to 2 *Barb.*, 565; 8 *Mass.*, 299; *Byles on Bills*, 95; and to support the general issue, cited 20 *Johns.*, 288, and 24 *Wend.*, 97.

NORTON, J.—The defense in this action rely upon the point that the note which forms the foundation of plaintiffs' claim, was given without consideration, and that he is not therefore bound to pay it. It seems that McKee gave this note at the meeting of the congregation, and afterwards, at the sale of pews, became a purchaser for a considerably larger sum than the amount of this note. The question turns upon the point of the authority of the trustee, who stated that donations would be received in payment for pews, to make the announcement, and the

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binding character, or otherwise, of the announcement upon the church. The trustee had not that authority, and his act in no way imposed an obligation upon the church, or on its legally constituted authorities, the board of trustees. These were not then obliged to comply with the terms of this announcement, and it does not appear that they have ever since ratified it. There was no mutuality in the contract. For the foregoing reasons the note was given without any legal consideration, and the plaintiffs are not entitled to recover. If McKee has purchased a pew, or pews, for which he is still indebted to the church, of course the trustees can recover from him the purchase money.

New trial granted.

GERKE vs. CAL. STEAM NAVIGATION CO.

Fourth Judicial District Court, October, 1857.

LIABILITY—PRECAUTIONS.

Where fire, used to generate steam, is likely to prove destructive to property, the persons using it must avail themselves of whatever appliances may have been proved competent to avoid the danger.

Where property has been destroyed by fire, originating from the sparks discharged from the smoke pipe of a boat running upon a navigable stream, in an action brought by the owner of the property, against the owners of the boat, for the damages sustained, he is entitled to a verdict, provided he can show negligence on the part of the owners, either in the construction or management of the boat, at the time, and that the damage was the immediate consequence of the negligence.

The complaint, in this action, sets forth, that defendant is a corporation, duly formed in accordance with law, and named the California Steam Navigation Company; that on or about the 9th of July, 1856, the defendant was the owner of a boat, called the "Swan," propelled by steam, and that they then caused the same to run upon the Sacramento river, in this state; that plaintiff was then the owner of certain real estate in the county of Tehama, known as the "Bosque," or "Lassen" ranch, the western boundary whereof is the Sacramento river; that he caused about one hundred and thirty-two acres of the said ranch, bordering on the Sacramento river, to be sown with wheat and barley, and that, at the time aforesaid, the said grain, and a large

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quantity of grass, had been put in shocks and cocks, ready to be threshed, and that it amounted, in wheat, to 1,600 bushels, and in barley, to 3,730 bushels, and of grass, about \$3,000 in value, and that he also had a fence about the said property ; that the said grain, as it stood, was worth \$9,000 ; that on the said 9th day of July, 1856, the wind blowing very hard at the time, the defendant, by its servants, caused the said steamboat Swan, to be run up the Sacramento river, and passed said boat directly past the said field of grain,—the same being under a pressure of steam, created by kindling the fires and heating the boilers, by defendant's servants, &c., whereby the sparks, arising from the fires, ascended through the smoke pipes, or chimneys, of said boat, and which so passing by the property, grain, &c., of plaintiff, the persons in charge of said boat, so unskillfully, negligently, and carelessly managed and conducted said fires, and the defendants so carelessly, &c., having had constructed said smoke pipes, and the servants of defendants, in charge of said boat, so carelessly, &c., run said boat, when the wind was blowing freshly, and without spark-catchers, that a large quantity of fire, and sparks of said fires, coming through the said smoke pipes, or chimneys, of said steamboat, through the careless, &c., management, &c., of said fires, on board said boat, &c., by the hands, &c., thereof, and carelessly, &c., not taking care of the tops of said smoke pipes, by placing thereon a cap, or net work, to prevent said sparks from escaping, which, if placed there, would have prevented the said burning, and which should have been placed thereon, and the careless, &c., manner in which said pipes were constructed, and the neglect of a spark-catcher on the same, the said sparks, &c., were driven, &c., upon the said grain, &c., and the same became wholly destroyed by such fire ; that the fence destroyed was worth \$200, the grass, \$3,000, and the grain, \$9,000, wherefore plaintiff prays judgment for the sum of \$12,200.

In the answer, the defendants deny that the fire originated as set forth in the complaint,—and as to the alleged negligence, deny that such fire occurred by reason of any carelessness, &c., on the part of the defendants, or their servants, &c., in the propelling, &c., of the said steamer, or by reason of the careless, &c., management of the fires, on board of said steamer ;—they deny that the said fire occurred by reason of the negligent, &c., manner in which the smoke pipes of

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the said steamer were constructed or managed,—and they aver that she was navigated in a careful, prudent, and proper manner, and with all proper care,—and that her fires were properly, &c., kept and managed.

The evidence adduced on the trial, established, that on the 9th of July, the wind blowing very freshly at the time, the steamboat “Swan” passed up the Sacramento river, on her regular trip, and that at about 12 M. she passed plaintiff’s ranch, the sun shining brightly at the time; sparks and burning pieces of bark, were seen issuing from her stacks, and being showered upon both banks of the river. It being at the height of the dry season, the grain and grass were everywhere in an extremely dry and parched state, and in a condition to ignite with extreme facility,—and, being once on fire, to burn with great violence, and to spread rapidly. Several other fields of grain, two of which were situated below plaintiff’s, on each side of the river, which this steamboat passed on that day were also burned in the same manner as the one to which this action has reference, soon after her passing.

Two of the witnesses, whose testimony plaintiff introduced to sustain his claim, saw the grain ignite from the sparks and burning matter deposited upon it, that is, they saw the sparks fall, and immediately afterwards, the grain commenced to burn, there being no person visible in the field, at that time.

As soon as the fire was discovered, the hands at work on the farm, some thirty in number, besides ten Indians, repaired to the spot and endeavored to put it out, but did not succeed, before thirty-five acres of barley and ninety-seven and a half of wheat, had been destroyed, besides a large quantity of grass and fence. The barley averaged forty-five bushels to the acre, and the wheat forty. The market price of each, at the time, being three cents per pound, while the expenses of sacking, threshing, &c., would have averaged ten cents per bushel. The value of the fence destroyed, was about \$175; but no evidence was introduced to show especially the value of the grass which was burned,—but a witness, (plaintiff’s agent, who had charge of the ranch,) estimated the total damage—including the destruction of the grass—at \$13,000, by which it appears, that he judged the value of this item to be a little more than \$3,000.

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Upon the attention of the captain of the boat being called to the fact of the burning of some of the crops, which were destroyed previously to the firing of plaintiff's, he said: "It is pretty hard on the farmers to have their crops burnt up; if I thought that the wind would lull in two or three hours, I would stop for that time."

Defendants submitted the case to the jury, on the testimony introduced by plaintiff, after first moving for a non-suit, on the ground that no negligence had been proven,—which motion the court denied, intimating that the above remark of the captain of the boat, was, in the opinion of the court, sufficient to bring the case before the jury.

E. Cook and McDougal & Sharp, for plaintiff.

Janes, Lake & Boyd, for defendant.

D. Lake, of counsel for defendant, contended that, inasmuch as plaintiff and defendant had each an equal right, the former, to cultivate the land on the banks of the Sacramento river, and the latter to navigate it with boats, or other vessels propelled by steam, in the ordinary and usual manner, therefore, to entitle himself to a verdict, in this action, plaintiff must, first, show that the fire whereby he was damaged, originated as set forth in the complaint, and secondly, he must adduce affirmative evidence in proof of actual carelessness and negligence on the part of the defendant, through its servants and agents, the captain and others, in charge of the steamboat "Swan," at the time at which the plaintiff alleges that his grain, &c., was consumed and destroyed by the fire so originating:—citing, *Rood vs. N. Y. & E. R. R. Co.*; 18 *Barb.* 74; *Stewart vs. Hawley*, 22 *Barb.* 619; *Radcliff's Exrs. vs. Mayor, &c., of Brooklyn*, 4 *Comst.* 195, 200 *et seq.* and 4 *Penn.* 466. The counsel further argued, that there was no evidence tending to show any carelessness or negligence, either in the construction or management of the boat in question, or of any part thereof, and that the casualty, by which it was the plaintiff's misfortune to receive the injury, for which he now seeks compensation, was an inevitable accident, occasioned *perhaps* by defendant, but if so, without any default whatsoever on their part, and while in the ordinary and legitimate pursuit of a regular business.

E. Cook, of counsel for plaintiff, agreed entirely with the counsel opposing, upon the accuracy with which he had stated the law, that the defendant was not liable, unless their action had demonstrated negligence and carelessness, but contended that the circumstances, as proven, attending this destruction of plaintiff's property, displayed negligence of the grossest character, and amply sufficient to render defendants liable for the damage sustained by plaintiff; and further argued that the testimony having disclosed that the captain of the "Swan" was aware of the danger caused to property of land owners along the banks of the river, upon which he was running, by the sparks discharged from the smoke stacks of his boat, the jury must find for plaintiff, if they believed that the captain, with this knowledge, could have prevented the casualty by the exercise of *greater* care than that which he actually employed,—as, for example, by deadening his fires, and running with a consequent decrease of speed;—citing, on the point of care, with a knowledge of danger, *Earing vs. Lansingh*, 7 *Wend*, 185, and *Dygert vs. Bradley*, 8 *ib.* 469.

Plaintiff requested the following instructions, which were given :

1st. If the jury believe, from the evidence, that at the time and place of the alleged injury, a high wind was blowing, that the season was dry, that no spark-catchers were attached to the chimneys of the boat, and that, for these reasons, and the nature of the fuel used in the furnaces, and the speed at which the boat was being run, the person managing said boat, as a reasonable and prudent man, should have known, that in passing the plaintiff's farm with the boat, under the circumstances, he would greatly endanger the property of plaintiff, by setting the same on fire, and the jury believe that the person navigating said boat, did so pass plaintiff's farm, and did so communicate fire to plaintiff's property, and destroy the same, they may infer negligence, and if they find that there was negligence, the plaintiff should recover.

2d. In determining the question of negligence, the season of the year, the dryness of the season, the state of the wind, the manner in which defendants guarded against accidents, by using spark-catchers, or otherwise, the fuel used, the speed of the boat, the knowledge of the captain as to all these, warning given him, and the degree of necessity for everything done by the captain, may be considered by the jury.

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The following were given at the request of defendants :

1st. The fact of the fire, which consumed the plaintiff's grain, being communicated by sparks from the defendant's steamer, is not sufficient evidence to establish negligence on the part of the defendant.

2d. The Sacramento river, at the point where the fire occurred, being navigable, the defendants had a right to navigate the said river, at all times and seasons of the year, and were not obliged to lay up the steamer by reason of the weather.

3d. The persons engaged in raising crops on the margins of the navigable rivers of the state, cannot recover for injuries to crops, occasioned by fire communicated by sparks from steamers, without proof of negligence in the management of the steamer, from which the fire is communicated.

4th. Steamers have a lawful right to navigate the rivers of the state in the dry as well as in the rainy season, and the fact that the fire, in this case, occurred in the dry season, is no evidence of negligence.

HAGER, J.—After stating and explaining the pleadings, and nature of the action, substantially charged the jury as follows :

By statute law a part of the Sacramento river is declared navigable. At the point where plaintiff's property was situated, at the time of its alleged destruction, it was and is a navigable stream and public thoroughfare, and defendants, at any and all times, had a legal right to enter and navigate it with steam, or other boats, for purposes of trade and carriage, or for such other as they are ordinarily used.

Steam is now used as a common motive power ; science and art have adapted and applied it to propelling boats and machinery, and its value and use, at the present age, is too common and necessary to be questioned or dispensed with.

As an ordinary rule, an action lies for any act done by a man in using his own property, whereby the rights of another are injured, unless such act be altogether inevitable, and beyond his control. Where fire, used to generate steam, is likely to be destructive to the property of another, it is necessary that the owner of the boat using it, should adopt the ordinary precautions, if any there be, which the disclosures of modern science and invention have shown necessary and efficient to prevent damage, where damages may probably occur.

The same precautions may not be necessary to a steamer navigating the ocean, that would be required to rail road locomotives, or boats navigating narrow internal streams, through agricultural or thickly settled regions. Then again, in case of a low-pressure engine, burning coal, the same precautions, care and diligence may not be required as there would be if the high-pressure engine, burning wood, was used.

The first question for the jury to pass upon is—did the defendants, by their agents, employed in navigating the steamboat “Swan,” and while in the act of so doing, by sparks discharged from the smoke pipes thereof, fire and destroy the property of plaintiff?

If, upon the evidence, you find affirmatively on this proposition, you should inquire and determine, whether or no, with ordinary care and diligence, the fire might have been prevented? Is it immediately attributable to the carelessness or negligence of defendants, or their agents, either in regard to the construction or management of the boat, or its appurtenances? Or was it inevitable and beyond their control?

The mere fact that plaintiff's property was destroyed, and that he has sustained damage, in consequence of the act of defendants, does not, of itself, make them liable, or entitle plaintiff to recover; to give plaintiff that title, two things must concur, damage to himself and a wrong committed by the defendants.

Defendants were engaged in a legal employment, and if, as a consequence, damages have resulted to plaintiff, they cannot be held liable merely because they have enjoyed a right accorded to them by the law of the land; something more than this must be shown.

Navigable rivers, like public roads, unless their enjoyment is restricted by law, are free and open to all for ordinary purposes of conveyance and transportation; and in addition to showing loss and damage to his crops, &c., occasioned by the defendants, the *onus* is upon plaintiff to show it has been occasioned by defendant's culpable negligence and carelessness.

If plaintiff has failed in this, the defendants are entitled to your verdict.

If you should find that the fire was occasioned by the defendants, in the manner alleged, and that it was not inevitable and beyond the control of defendants, but owing to their culpable negligence and carelessness, plaintiff is entitled to recover such damages as will cover the actual loss, which, upon the evidence, you find he has sustained.

Verdict for plaintiff, \$9,200.

Powell vs. Bandy.

POWELL vs. BANDY.

Sixth District Court, for Sacramento Co. November, 1857.

EJECTMENT—PRE-EMPTION.

A pre-emption claim is not sufficient to maintain ejectment.

The facts are set forth in the opinion. The case was tried by the court without a jury.

Upton & Hereford, for plaintiff.

Wallace & Rayle, for defendant.

BORRIS, J.—This is an action of ejectment, in which a jury was waived, and the facts, as well as the law, were submitted to the decision of the court.

The plaintiff, in his complaint, describes two tracts of land, to which he alleges the right of possession, averring that the defendant has wrongfully seized and unlawfully detains an undescribed portion of the first tract and all of the second tract. The answer denies an entry upon any portion of the first tract, but admits the possession and adverse holding of eighty acres of the second described tract, denying, however, the plaintiff's right of possession.

As matter of fact, I find, that the first described tract was stepped off by the plaintiff's agent in 1853; that four posts, about four inches square, were set up at the four corners of that tract so stepped off; that one of the posts projected above the surface about four feet, and the other three, about two feet; that one of the posts was marked with an X, and another with a P; that the land so marked was well timbered, and that from no one point could all the stakes be seen; that it does not appear how many acres were contained in the area described by said posts; that on a portion of said tract the plaintiff erected a house and enclosed a field; that on the 25th day of May, 1856, before, Jno. Q. Brown, who subscribed himself a Notary Public, without a seal, the plaintiff made an affidavit in pursuance of the third section of the "act prescribing the mode of maintaining and defending possessory actions on public lands in this state," in which said tract is described; that said

affidavit was filed in the office of the recorder of the county of Sacramento.

As to the second tract, I find that it consists of the north-west quarter of section twenty-seven, in range ———, township ——— of the U. S. survey; that to said quarter section the plaintiff filed his preëmption claim in the office of the U. S. Land Register, on the ——— day of ———; that the first described claim, in part, overlaps said quarter section, and that the defendant is holding the eastern half of said quarter section, adversely to the plaintiff; that said eastern half includes about sixty acres of the described tract.

The plaintiff must recover upon the strength of his own title, and he relies for this title upon three things: his preëmption claim, his right acquired under the act of April 20, 1852, and his prior possession.

The plaintiff's right of preëmption vests in him—no interest in the land. It simply secures to him the privilege of a future acquisition upon certain terms and conditions. It is, at best, no more than a contract for the privilege of purchasing, at a future time, upon specified terms; and who ever heard, that upon such a contract, ejectment could be maintained? If authority for a proposition so plain as this were wanting, we would refer to *Bower vs. Higbee et al.*, 9 *Missouri*; *Davenport vs. Farrar*, 1 *Scammon*, and 4 *Blackford*, 286.

To the plaintiff's claim under the law of 1852, there are, to my mind, two insuperable objections. The 2d section of the act provides, "every such claim to entitle the holder to maintain any action as aforesaid, shall not contain more than one hundred and sixty acres, and the same shall be marked by metes and bounds, so that the boundaries may be readily traced, and the extent of such claim easily known, and no person shall be entitled to maintain any such action for possession of, or injury to any claim, unless he or she occupy the same."

In the first place, I apprehend, that under this section, the burden devolves on the plaintiff, of showing that the claim upon which he relies, contains no more than 160 acres. It is upon this condition only that the statute gives the right of action—the plaintiff must show affirmatively, that he has brought himself within the statute.

Secondly, I imagine, that when the statute requires that the claim shall be marked by metes and bounds, so that the boundaries may be *readily* traced, it intends something more than the setting up of four stakes at the four corners of a 160 acre tract.

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As to the acts which constitute that character of possession, which would sustain ejectment at common law, the Supreme Court, in *Murphy vs. Wallingford*, October term, 1856, have definitely settled that acts much stronger than any performed by the plaintiff, in this case, are not sufficient for that purpose.

Upon the whole, I can perceive no right of possession in the plaintiff to the premises in controversy.

Let judgment be entered for the defendant.

VALLEJO vs. ANDERSON.

Third District Court, for Santa Clara Co., October, 1857.

EJECTMENT—POSSESSION.

Where title to land requires *political* action to perfect it, it is insufficient to sustain ejectment.*

Where the bounds, mentioned in a grant from the Mexican Government, give more land than the grant purports to convey, the giving of judicial possession to the grantee, by metes and bounds, is necessary to enable him to maintain ejectment for a part thereof, of which he had not actual possession.

This suit was instituted for the purpose of recovering a tract of land claimed under a Mexican grant.

The plaintiff introduced, in evidence, a grant made by Governor Alvarado, in 1842, for the “*Rancho de la Alameda*.” This grant describes the land as being bounded towards the south, by the creek “*Alameda*,” towards the north, by the creek “*Alto*,” towards the east, by the crest of the mountains, and towards the west, by the bay, and being for four leagues.

Vallejo was required, by the terms of the grant, to apply to the proper officer and to obtain judicial possession by metes and bounds; the grant further provides, that the overplus should remain public domain, and also, that it should be approved by the departmental assembly.

The plaintiff failed to obtain judicial possession—was occupying a part of the tract (but not the part in controversy) when granted, and still continues his occupancy thereof. He also introduced proof of an

* See *supra* *Hensley vs. Tarpey*, 211.

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enclosure and cultivation; also the proof of "rodeos," and of his "rodeos" on the land, prior to the acquisition of the land by the United States. There was no proof of approval by the departmental assembly. He also introduced the records of the district court of the United States, of the decree of confirmation of the grant—of an appeal therefrom, and its dismissal. He also introduced the *diseño*, or map, and the petition on which the grant was made. This map sketched the land as above described, except the creek "Alto," which by the map, issued from the mountain and ran in a westerly direction towards the bay, terminating in the valley, in front of the bay, from three to five miles therefrom.

About a mile from its termination, or sink, towards its source, a diverging line from the creek, is projected to the bay, north-westerly of the creek, and is marked upon the map, embracing a larger area of land than would be embraced by the creek line.

The defendant introduced proof that the land in dispute is excluded by the creek line, but included by the diverging line; and also, that within the creek line, there are within the described boundary, between six and seven leagues of land.

The counsel for the plaintiff assumed the following positions:

1st. That the decree of confirmation vested the legal title in the plaintiff, so as to enable him to maintain this action.

2d. That he, having had possession of a part of the land under the grant, was constructively in possession of all the land described therein.

3d. That the plaintiff had actual possession of the whole tract, including the land in dispute, prior to the possession of defendant.

Hamilton, Patterson and Williams, for plaintiffs.

Clark, Archer, and McKee, for defendant.

HESTER, J., held, in his instructions to the jury:

1st. That as to the first point assumed by the plaintiff: the grant not having had the approval of the departmental assembly, created only an inchoate or equitable title in the claimant, requiring political action to perfect it; that the legal title to the land, in virtue of the treaty with Mexico, passed to the United States; that the 8th and

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9th articles of the treaty imposed a political obligation upon the United States, to protect the Mexicans included in the acquired territory, in their property, but without restriction as to the mode—in regard to which Congress had a discretionary power, and in the exercise thereof might have given to the decree of confirmation of the Land Commission, or the courts, the effect of passing the title from the United States to the claimant,—such, however, is not the act of Congress, passed in 1851, to ascertain and settle private land claims in the state of California; its language is, in conferring power upon the land commission and courts, “to decide upon the *validity* of the claim;” (See § 8,) leaving the character of the title as it was before; this character it retained, whether it was an inchoate or equitable title, or a perfect legal title, under the grant; that it can derive no aid from a decree of confirmation, either by the land commission or the court, to entitle it to judicial notice in this form of action; that the decree of confirmation did not divest the United States of the legal title, but she yet holds it as trustee for the claimant, and would so hold it under the existing law, until the emanation of the patent, although the issuing thereof is a ministerial act; that a perfect Mexican grant, vesting in the grantee the legal title, is sufficient, with or without confirmation, to sustain an action of ejectment; that the grant, in this case, creating only an equitable title, is insufficient to enable the plaintiff to recover.

It was also held, that the only notice which a jury had a right to take of the record evidence of the decree, was to enable them to determine whether the claim was presented to the proper forum, within the time limited by the act of Congress.

2d. It was also held, as to the second position, that the grant conferred a right to only four leagues, provided that quantity is within the boundary of the grant; that if there is an excess, the same remains part of the public domain; that if there is no excess, the grant of the Governor, describing the tract by metes and bounds, was a segregation thereof from the public domain; that the creek “Alto,” and a straight line from its termination to the bay, projected according to the general course of the creek, is the line described in the grant, towards the north; that the line towards the bay, is the line of ordinary high tide; that if there are more than four leagues within the described boundary, judicial possession, by metes and bounds, was necessary under the

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Mexican government, to segregate the land granted from the public domain, and was also necessary, to confer upon the plaintiff the right of constructive possession of the land in connection with his actual possession of a part thereof; that this right of constructive possession did not attach without a certain and definite boundary; that the quantity of land within the described boundary, is a question of fact for the jury to determine; that if there are not exceeding four leagues, the description in the grant is a sufficient indication of the boundary to enable the plaintiff to avail himself of the constructive possession, but if there is an excess, the plaintiff's right being limited to four leagues, the same should have been set off to him by metes and bounds, without which the plaintiff cannot avail himself of the constructive possession.

3d. It was also held as to the third position, that if the plaintiff was in the possession of the land in dispute, previously to the defendant, his prior possession was evidence of an older and better right; that possession of land is the power of controlling it, and subjecting it to one's own use; that it is not necessary, for this purpose, that it should have been enclosed with a fence, provided the use was secured; that "rodeoing" was an act of ownership over, and is a circumstance for the jury to consider as to the boundary of the rancho, but unless the owner had control of the land as above mentioned, "rodeos" do not constitute possession; they are circumstances, however for the consideration of the jury, in determining the fact of the owner's control of the land.

The jury found for defendant.

AULD vs. CLARK.

Sixth District Court, for Sacramento Co., November, 1857.

LIABILITY—DAMAGE—AGENT.

Where damage is suffered in consequence of the unskillful execution of an act, performed by an artisan, hired to do certain work in his regular trade, the *tort-feasor*, and not the employer, is liable therefor.

The employer is only liable where the relation of master and servant, or of principal and agent, exists, which is not the case in the above instance.

When the injury arises, not from the *manner* of doing the work, but from the *fact* of its

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being done *at all*, or where the employer sanctions the manner in which it is done, the relation of principal and agent exists.

The facts are set forth in the opinion.

Cole & Whiting and *E. D. Baker*, for plaintiff.

Sunderland and *Clark & Gass*, for defendant Pershbaker.

Long & Morrison, for defendant Clark.

BOTTS, J.—The plaintiff was a dry goods merchant, keeping a shop on J street, between 4th and 5th streets, in the city of Sacramento. The defendant, Pershbaker, was the owner of the house in which the shop was kept. Clark, the other defendant, was the owner of the adjoining lot. The foundation of Pershbaker's house did not extend more than twelve inches below the surface of the earth. The base of Pershbaker's eastern wall projected about nine inches over the line dividing his lot from Clark's. Clark proposing to build a house on his lot, with a cellar, Pershbaker entered into a contract with Clark, whereby it was agreed that Clark should have Pershbaker's wall underpinned to the depth of Clark's excavation; that the expense of said underpinning should be borne jointly by Clark and Pershbaker; that the wall of Pershbaker, as it then stood, should be valued by arbitrators, that Clark should pay to Pershbaker one-half of such valuation, and that said wall should be a party wall between Clark and Pershbaker. Clark employed one Eisen, an architect, to contract for, and superintend the erection of his building, including the underpinning of the party wall. Eisen contracted, on Clark's behalf, with one Turtin, a builder and contractor, for the excavation of Clark's lot, the underpinning of the party wall, and the erection of the building. In the course of the excavation, the eastern wall of Pershbaker's house fell, and injured the goods of the plaintiff. The excavation, when the wall fell, had not approached nearer than two and a half feet at the top, and three and a half feet at the base, to the line of Clark's lot. It was admitted that the caving was in consequence of the superincumbent weight of Pershbaker's wall, and upon this evidence and this admission, a judgment, as of non-suit, was rendered in favor of the defendant, Clark, who had answered separately, upon the ground that he was not liable for any damage arising from the caving in of Pershbaker's earth, if that cav-

ing was the result, not of the natural condition of the earth, but of the pressure occasioned by the superstructure of Pershbaker's erection ; any liability upon the part of Clark, accruing from the contract between Clark and Pershbaker could not, for want of privity, be enforced by the plaintiff Auld. It came, then, to this : If Pershbaker was proceeding to excavate and underpin the wall of his house, and authorised Clark to contract for the work, and Clark authorised Eisen to contract for him, and Eisen did contract with Turtin, did the injury result from the unskillful manner in which the excavation was made, and what was the amount of damage sustained by the plaintiff. Upon the trial it was agreed that the following questions should be submitted to the jury, to be found upon by them in the form of a special verdict, and that any other facts necessary to the determination of the case, should be determined by the court :

1. Was the work from which the injury resulted, done with the assent of Pershbaker for the joint benefit of Pershbaker and Clark ? To this question the jury returned an answer in the affirmative.

2. Did the injury result from the negligence and unskillfulness of the contractor ? To this question the jury returned an answer in the affirmative.

3. What amount of damages did the plaintiff sustain by the falling of the wall ? Answer—one thousand dollars.

If, upon these facts, the defendant, Pershbaker, is legally liable, then should a judgment against him for one thousand dollars be entered in favor of the plaintiff, otherwise the judgment should be for the defendant.

The case involves the consideration of the doctrine of "*respondet superior*," and a determination of the principles upon which it rests. No question has been more mooted in the whole science of the law. If we were content, as the civilians are, to let every case be tested by its particular merits, there would be no difficulty ; but such is not the spirit of the common law. The first principle of that noble system requires that the community shall know the rule by which they are to be governed ; and that they may know, it shall be clearly and explicitly declared, in terms which shall include all cases that can by probability arise. For the terms of this rule, by which one man is to be held responsible for the acts of another, the English and American judges

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have been groping about for the last half century. It was at first said to be a consequence of the relation of master and servant, and the liability of the parties was to be determined by the existence of this relation. But this was not sufficiently definite, for it left two questions still open: what is the definition of servant, and for what acts of the servant shall the master be liable. Servants were defined to be menials, day laborers, or those who worked *extra mœnibus*, apprentices and stewards, factors, and bailiffs, who were reckoned as *quasi* servants.

At first the superior of all who came within the category of servant so defined, was held responsible for all damages arising from the malicious, as well as the negligent or unskillful act of the servant. But in *McManus vs. Crickett*, 1 *East.*, 106, it was held that the doctrine of the responsibility of the superior rested upon the presumed control exercised over the servant; therefore, to make the master liable, the injurious act of the servant must have been committed whilst engaged in the business of his employer; and when he acted from a malicious motive, he could not be said to be *quoad hoc* the particular act, transacting his master's business, even though the injury were committed with the property of the master; as in the case of a coachman maliciously driving his master's coach against the horse or vehicle of another. This was in the year 1800, and through much opposition, for it was urged that the coachman being employed to drive cautiously, the master should be no more responsible for his negligent than for his malicious driving; through much controversy, I say, the rule that the master is liable for the neglect and not the malicious acts of his servant, has become the law both in England and America.

In *Bush vs. Steinman*, 1 *Bos. & Pull.*, decided about the same time, it was held that this liability of the superior extended to the wrongful acts of his contractors, sub-contractors, and their agents and servants, *ad infinitum*. In *Laugher vs. Pointer*, 5 *Barn. & Cres.*, decided in 1826, the authority of *Bush vs. Steinman* was doubted, and it was held that where one hired a driver of a livery stable keeper, for injury resulting from his negligent and unskillful driving, the owner of the horses was not liable. The same question arose in *Onarman vs. Burnett*, and was decided upon the authority of *Laugher vs. Pointer*, although it was intimated that there might be a distinction between acts done in and about movable and immovable property.

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Nothing could be more unsatisfactory than the condition in which this case left the general principle. Then and lastly, in 1849, came the case of *Reedie vs. The L. & N. W. Railroad Company*, reported, 4 *Welsb. Hurlst. & G.* This decision is the more worthy of notice, because it is cited, and, with approbation, by the Supreme Court of *California*, in the case of *Janes vs. The City of San Francisco*.* In this case it was held that *Bush vs. Steinman* was not law; that the distinction between movable and immovable property was unsound; and where the contractor employed is carrying on an independent business, such contractor, and not the owner, is liable for the injury arising from his own unskillfulness, or the negligence of his employé; the only requirement of the owner being, that he shall use reasonable care in the selection of a contractor of fair repute. The liability of the owner, it seems to me, must rest either upon the relation of master and servant, or of principal and agent. Where neither of these relations exists between the *tortfeasor* and the party sought to be charged, there can be no liability. To the mere fact of ownership, no importance can be attached. I am liable for damages arising from the negligence of my coachman, not because the coach he is driving belongs to me, but because he is my servant, and I am his master.

Hence it was held that the owner of cattle was not liable for the damages arising from the unskillfulness of the driver, the servant of a licensed drover who had contracted to drive the cattle to Smithfield.

From these cases we gather, that when the injurious act is committed by one filling the office of a servant, the doctrine of *respondeat superior* prevails, and to ascertain who the superior is, we have only to inquire whose servant the actor is. He cannot have two distinct and separate masters. But the great question to be solved is, who and what is a servant? Is my coachman the less my servant because he contracts to drive my horses for a stipulated sum? and here I think comes in the test hinted at in *Reedie vs. The L. & N. W. Railway Company*. If the thing to be done is the subject of a substantive and distinct calling; in short, of a *trade*, the employé and not the employer is responsible for the damage arising from the manner in which the work is done. "*Expert*" is a term well known to the law, and whenever the work to be done is the business of an expert, all that can be

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required of a layman, so to speak, is to use reasonable care to commit his business, which may be injurious to others, as it is skillfully or unskillfully performed, to the hands of an expert of good repute. To go beyond this, and make an ordinary business man responsible for the acts of a scientific engineer or architect, acts, the result of which it being impossible to foresee, he could not control, would be neither just nor politic. When, however, the work directed to be done, results in injury to another, not from the manner in which it is done, but from the fact of its being done at all, or where the manner producing the injury is prescribed or sanctioned by the employer, then arises the relation of principal and agent. He who orders may be held to answer, upon the principle *qui facit per alium, facit per se*; or they may both be sued as joint trespassers, or joint tort feasers.

Now, let us apply these principles to the case in hand. Pershbaker employs Clark to contract for the underpinning of his house; Clark employs Eisen to contract for him. So far, perhaps, Clark and Eisen are agents of Pershbaker; but Eisen employs Turtin, a tradesman, to perform a work of art, requiring the skill of an expert, leaving the mode of performance to the judgment of the contractor; and from the unskillfulness of this expert, damage is caused to the plaintiff.

Suppose I employ a physician of good standing, to attend a member of my household afflicted with some infectious disorder, and by the negligence and unskillfulness of the physician the disorder spreads, am I, either legally or morally, responsible for such consequences? and yet that case differs not in principle from this. I think judgment must be rendered for the defendant; upon obvious principles of reason and policy, and upon the faith of modern decisions, it is not to him that the plaintiff must look for any damage he may have sustained.

Let judgment be entered for the defendant.

COLEMAN vs. GLADWIN.

Fourth District Court for San Francisco County, August, 1857.

SALE AND DELIVERY OF GOODS—FRAUD—ARRESTS.

Where goods sold are in the custody of the bailee of the seller, and nothing remains

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to be done to ascertain the price, quantity, quality or individuality, the sale and delivery is complete upon the giving of a delivery order upon the bailee, and an acceptance, and readiness, *and ability*, on his part to comply with it.

Where a defendant has been arrested, and the question of fraud is submitted to a jury, they may infer a *fraudulent intent*, from acts, conduct and circumstances showing that either *positive* or *constructive* fraud has been committed.

A debtor may, by a void or illegal contract, in good faith attempt to dispose of his property, without rendering himself amenable to the statute authorizing arrests.

This action was commenced on the 18th of June, 1857, to recover the value of certain pork sold to defendants, pursuant to a contract dated February 25th, 1857. The plaintiffs set forth in their complaint that they, at the special instance and request of defendants, sold and delivered to them, at the city of San Francisco, about the 16th day of May, 1857, two hundred barrels of pork, at the price of sixty-three hundred dollars; that the full amount of said price is fully due, and remains unpaid to plaintiffs: wherefore said plaintiffs demand judgment, etc.

For answer, the defendants deny that the sale and delivery mentioned in said complaint was completed until the 19th day of May last, and that no action accrued to plaintiffs for the price thereof until the 19th day of June, A. D. 1857; they deny that at the time of the commencement of this action they were indebted to plaintiffs in the sum of sixty-three hundred dollars, or in any other sum whatever. They aver that this action has been prematurely brought: wherefore they pray, etc.

On the 3d of July, Henry Carlton, Jr., one of the plaintiffs, made affidavit that he had been informed by his counsel to the effect that it would be necessary to amend the complaint by inserting certain allegations, (those forming the amendment to the complaint immediately following.) Upon this affidavit an order was granted commanding defendants to show cause, on the 6th day of July, why the amendment should not be permitted as above prayed for. Leave to amend was granted, after hearing argument of counsel, on the 13th of August, in pursuance of which plaintiffs filed the following amendment: "The plaintiffs for amended complaint by leave of the court for that purpose first had and obtained, aver that defendants as plaintiff is informed, and believes were, on the 3d day of July, 1857, about to depart from this State for the purpose of defrauding their creditors;

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and for further amendment the plaintiffs aver that they are informed and believe, and therefore charge that the defendants had, on the 3d day of July last, removed their property for the purpose of defrauding their creditors. The plaintiffs therefore pray, in addition to the prayer of the original complaint, for execution against the body of the defendants.

The answer of the defendants denied that they, or either of them, at or about the time of the commencement of this action, were, or at any time since have been, or are now, about to depart from this State for the purpose of defrauding their creditors. They emphatically deny any intention whatsoever on their part, or on the part of either of them, of departing from this State either at or about the time of the commencement of this action, or at any time since, or now. They deny that they, or either of them, have disposed of, or removed their property, or any part thereof, for the purpose of defrauding their creditors, or any of them.

In addition to this action there were also commenced, on the same day, against these defendants, the following, to wit: by Jackson McKenty, for \$25,912.05; by George S. Gladwin & Co., for \$13,492.33; by Wm. M. Lent, for \$5,000; by U. P. Hutchings, for \$2,500; by Garrison, Morgan, Fretz & Ralston, for \$8,500; by H. M. Whitmore, for \$4,800; by Sanjurjo & Co., for \$7,875; by Flint, Peabody & Co., for \$5,420; by W. Horr & Co., for \$1,449.64; by J. R. Newton & Co., for \$3,377.75; by S. C. Bigelow, for \$1,000; by A. B. McCreary, for \$9,449.55; by Bosworth, Masten & Co., for \$600, and by Fay & Willis, for \$1,695.60. On the trial it was admitted that plaintiffs compose the firm of Wm. T. Coleman & Co., and defendants that of Gladwin, Hugg & Co., and also that the latter executed the contract upon which this action is founded.

It appeared that one hundred and sixteen barrels of the pork, to recover the price of which this action is instituted, were delivered from the ship "John Milton," on the 14th of May; twenty-seven more on the following day, and fifty-five on the 16th, making one hundred and ninety-eight barrels out of the whole two hundred; the remaining two barrels of which were not delivered until the 19th. The delivery order on the clerk of the ship, dated May 8th, and accepted by him on the 14th, was put in evidence. One hundred and eighty-seven

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barrels went to Alsop & Co.'s warehouse, on account of J. D. Teller, who had loaned upon it \$4000, while the remainder, being out of order, were sent to the store of defendants.

On the 4th of June, defendants borrowed \$2,500 of U. P. Hutchings, of the firm of Sweetzer, Hutchings & Co., giving therefor two notes of \$1,250 each, at two and a half per cent. per month, which sum fell due on the 19th. On the 18th, Hutchings received a demand note for the whole debt of \$2,500, at the same time returning the two original notes, and attached the stock of defendants, but this being in order the fifth attachment, was worthless. It had always been understood that in case of difficulty Hutchings was to be secured; and in pursuance of that understanding he received from defendants on the 1st of July a note of a Stockton house, endorsed by defendants, for \$2,300, due about the 10th of August. The defendant Gladwin lived with Hutchings; yet the latter, although aware that they were in want of money, had no idea that they were about to fail until June 18th, when Gladwin told him to go and secure himself by attachment. Joseph H. Goodman, the salesman of the defendants, bought from them on the account of his brother at Napa, one hundred and twenty-seven barrels of the pork, out of which this action originated, on the 11th of June, for \$6,634.22, which pork was then removed from Alsop & Co.'s, and stored, a portion in the North Point warehouse, and the remainder in Crowell's warehouse. The entry of this sale, however, was not made until July 3d, being fifteen days after their failure. At the same time several other entries were made, among which was a payment of \$3,136 to W. H. Sitten, hereafter more particularly mentioned. About the 24th of June, G. H. Davis purchased of Goodman twelve barrels of mess pork, the location of which Goodman refused to give. The latter at the same time offered to sell Davis for other parties a large amount of Billings' hams, lard, cheese, and American hams. This offer, Goodman testified, was made merely by way of a joke, for he had not the goods, nor had he any prospect of getting them. Ten more barrels of this mess pork were sold by Goodman on the next day to Moses Ellis, who also bought from him, about the 1st of July, certain Billings' hams to the amount of \$800. On the same day, G. R. Whitney bought \$180 of hams of Goodman, which were delivered by the latter at the boat free of charge.

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Goodman was aware, on the 13th of June, the day on which a rough account of stock was taken, that defendants would be obliged to fail. On that day defendant Gladwin, during a ride with P. T. Southworth, informed that gentleman that he was in want of money, and offered to sell him for \$2,200 a certain lot on Kearny street, upon which one L. E. Ritter held a mortgage for \$12,000, which was bearing interest at the rate of one and a half per cent. per month. Southworth bought the lot and building, and purchased at the same time Gladwin's horse, buggy and harness for \$800, making a total of \$3,000, which he paid on the 17th. On the 4th of June, Southworth loaned \$2,000 to defendants, taking their endorsement on a check. Gladwin promising to protect him in case of difficulty, this sum was not deducted from the \$3,000 paid for the land, etc. On the 16th of June he received one hundred barrels of sugar, worth about \$3,275, with orders to sell at the best price that he could get, and made an advance thereon of \$2,500, all over which was to be retained in part payment of the debt of \$2,000. On June 23d he received for the sugar \$3,278,66; paid for storage, \$18,75, and for cartage, \$12,50, leaving \$747,41 above his advance. On the 28th five bills-receivable were placed in his hands, to wit.:

A note of Eckman, Tennant & Co., for \$497,00	due July 3d.
A note of Hamilton & Co., for . . . 478,40	due June 25th.
A note of S. L. Dewey, for . . . 645,30	due July 3d.
A note of Garretson & Bell, for . . . 500,00	due July 16th.
A note of John Allen, for . . . 526,26	due July 1st.
Total,	<u>\$2,646,96</u>

The money upon these notes was all received. Upon the delivery of them to Southworth, he gave eleven checks to the employés of Gladwin, Hugg & Co., as follows, to wit.:

One to E. Palachi, for . \$22,50	One to W. Grant, for . . 140,09
One to W. G. Smith, for 20,00	One to S. B. Brabbs, for 297,50
One to W. B. Gladwin, for 343,69	One to B. Kelly, for . . 624,00
One to L. C. Mills, for . 66,62	One to W. A. Piper, for 425,00
One to G. R. Smith, for 150,73	One to A. Coffin, for . . 166,00
One to Russell Davis, for 340,00	<u>\$2,596,13</u>

—leaving to the credit of Gladwin, Hugg & Co., \$50,78, which the interest account would absorb.

On the 18th of June, he received a note of Stewart & Co., for \$1,284,55, which, with the surplus on sugar, (\$747,41,) left to the credit of defendants after the payment of the \$2,000, the sum of \$31,96. E. W. Washburn, on the 8th of June, advanced defendants \$2,000 on certain sugars and coffee, and on the 10th, \$2,000 more. These goods had previously been hypothecated to Alsop & Co., for \$9,800. On the 13th of June, he sold these sugars and coffee for \$11,560,51. There was then due Alsop & Co. \$9,823,60, leaving a balance of \$1,736,91 in Washburn's hands, and defendants' debt to him, \$2,263,09. On June 17th, he sold butter for them to the amount of \$1,298,00, leaving still due him \$965,09. On the 25th of June, Gladwin gave him two notes, one of L. G. Root, dated June 15th, at thirty days, for \$636, and one of N. S. Root for \$350, dated June 16th, at sixty days, bearing interest at the rate of two and a half per cent. per month. About the 10th of June, defendant Hugg informed J. G. Pope, in a casual conversation, that their firm was solvent; that in the latter part of May an account of stock had been taken, and that then the stock was sufficient to pay all their debts, saying nothing about what was thereby due other parties, or that the sum due defendants on book-accounts was sufficient to meet all their own liabilities, leaving their stock clear.

On the 8th of June, Hugg purchased of Flint, Peabody & Co. twenty-two tierces of hams, and twenty-five barrels of syrup, amounting to \$5,700, credit being to July 19th. At the time of this purchase defendant Hugg stated to Wm. H. Kellogg, of said firm, that Gladwin, Hugg & Co. were then in a perfectly sound and solvent condition.

Macondray & Co. sold to defendants, on the 25th of April, teas, of the value of \$11,606,55, payable on June 4th, with privilege of extending one half fifteen days from that date and the other half thirty days. Afterwards, and before their failure, sold them other tea, worth \$112,50. No part of this debt was paid, nor had legal proceedings for the recovery thereof been instituted. At the time of their failure defendants were also owing Macondray & Co. \$10,000, bearing interest at the rate of two per cent. per month, advanced upon goods

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pledged. Gladwin sold a rockaway, buggy, and double and single harness to Henry Casebolt, on the 12th of June, for \$375, for which the latter gave a note payable in thirty days with interest at two and a half per cent. after date.

S. Price held a note of defendants for \$1,000 given by McKenty as collateral security for \$2,500, borrowed by him on the 19th of May; this note fell due on the 18th of June, and was taken up by McKenty then. At the time of the failure, H. M. Whitmore held two demand notes of defendants for \$1,000 each, dated June 4th, and bearing interest at the rate of two per cent. per month. On the same date he made an accommodation endorsement for defendants for \$3,000 on their note due July 3d. On the 18th of June he received a demand note for \$4,800, (\$200 being omitted by mistake,) on which he attached, ante-dated to June 4th, and bearing two per cent. interest. None of the interest on the two demand notes of the defendants held by him was paid. When the note for \$4,800 was given, these two notes were delivered up. When the note for \$3,000 fell due he took it up. On the 1st of July he received from defendant Gladwin seven cases of hams, which had not been attached, worth \$974.40, which, at the suggestion of the latter, he turned over to Goodman for sale. E. Bailey sold defendants, on June 9th, two hundred chests of tea, valued at \$2,500, at credit of thirty and forty-five days. This tea was in their store at the time of their failure, and was attached with their other property then there.

On the 17th of February, 1857, defendants made a contract with W. Newell for the purchase of fifty cases of lard, to arrive per ship "Comet," at twenty cents per pound. This contract was assigned to McKenty, on the 18th of June, for \$1. The "Comet" arrived soon afterwards, and McKenty took the lard, which was worth twenty-five cents per pound, and made about \$275 out of it. Wm. M. Lent was an accommodation endorser on a note of defendants for \$5,000, due on the 18th of June, and held by Sparrow, Teackle & Co., which note he took up when due. On that day he received a note from defendants, corresponding in amount, date and interest with the one which he endorsed, upon which note he then attached. His being in order the fourth attachment, was worthless; wherefore he received from defendant Gladwin, on the 1st of July, \$4,558.43 in cash. On

the 18th of June, McKenty and J. Clement exchanged notes for \$4,558,43, bearing date on that day, payable August 17th *a* 20th, at two per cent per month, each to order of maker. E. V. Thompkins bought Clement's note of Gladwin, Hugg & Co. on the 1st of July, giving therefor two checks payable to cash or bearer. He then sold this note to E. Teackle on the next day, taking therefor his check, on which the money was duly drawn. Clement took up his note on the 17th of August, by depositing that of McKenty, for which it was originally given in exchange. McKenty then secured Teackle by giving him a lien on his (McKenty's) attachment.

Defendants, at the time of their failure, owed A. B. McCreary \$9,400, for the whole of which amount he attached and garnisheed as follows, to wit.: 100½ barrels of pork, delivered on the 17th of April, and 100½ more delivered on May 18th. One Himmelman held 1,075 boxes of candles of Gladwin, Hugg & Co., at twenty pounds per box, and 185 boxes at thirty-four each, which were then worth 22½ cents per pound, being \$6,252,75, on which he had advanced them \$6,000. McCreary paid the advance and had the goods transferred to him. On the 10th of June defendants bought ten cases of tobacco of J. Franck, at thirty-four cents per pound, amounting to \$722. This was in their store at the time of the failure; was attached, and then replevied by Franck.

Wm. H. Dow sold defendants, on the 5th of June, candles, to the amount of \$2,400. These were soon afterwards hypothecated to one Luning, for about \$2,000. On the 12th of the same month B. G. Whiting loaned defendants \$500, which Gladwin paid on the 19th. At the time of their failure defendants were indebted to Wm. H. Sitten in the sum of \$3,160, which they paid on the 19th of June, by two notes, one of Geo. S. Gladwin & Co., for \$2,500, bearing date on that day; the other being note of — — —, dated about June 15th, for \$635. Defendants also owed M. F. Truett \$2,700; \$2,000 of which they paid on June 19th, as follows: a note of Flagg, Powers & Culver, for \$1,044,44; one of Scott, Vantine & Co., for \$834,97, and the balance, \$120,89, in cash. On the 4th of May, Alsop & Co. advanced defendants \$6,000 on coffee; on the 6th, \$6,500 on candles, (a portion of which goods, as already stated, were sold by E. W. Washburn on the 13th of June,) and on the 18th, \$13,500 on pork

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and hams—all the loans bearing two and one half per cent. interest. On the 11th of June, defendants bought a considerable amount of sugars, on a credit of thirty days on endorsed paper; Geo. S. Gladwin was an endorser to the amount of \$4,000. At the time of the failure, defendants had paper in the bank of Drexel, Sather & Church to the amount of about \$28,000, deposited principally by merchants. At the same date, Wm. A. Dana held a note of theirs' for \$2,965,67, dated May 19th, and due June 19th, bearing interest at the rate of two and three-fourths per cent., and endorsed by Geo. S. Gladwin. Also, a note for \$1,100, secured by merchandise. When the first note fell due Geo. S. Gladwin paid it. They were also indebted to Chas. F. Lippman in the sum of \$8,000—\$5,000 secured by certain syrups, pledged; the remainder represented by a note for \$3,025,50, endorsed by Geo. S. Gladwin and J. McKenty. The note was taken up at maturity by Geo. S. Gladwin. On the 17th of June, defendant Hugg wrote to Robert G. Hanna, of Stockton, to whom they owed \$4,955,43 on a promissory note dated May 13th, at thirty days, bearing interest at two per cent. per month, informing him that they must fail, and advising him to secure himself, which he did by garnisheeing the following persons, whose names and the amounts of whose indebtedness were furnished by Hugg in the letter referred to:

W. B. Topee,	\$1,269,68.
Matthews & Sanderson,	413,50
J. C. Sheppard,	785,00
B. McKee,	542,00
J. M. Buffington,	240,00
H. S. Stone,	210,00
	<hr/>
	\$3,460,18

Of this he succeeded in collecting \$3,293,70. On the 21st Hugg gave him a note of Elliott & Co. for \$437,74, and one of Stephens for \$1,269, making \$5,000,44, a little less than the debt and interest.

On the 18th of June, Jackson McKenty attached for \$25,912,05 on a note made on the 16th, given as security for various notes on which he was an endorser, and for various other debts due him. The

notes upon which he had endorsed bore interest after maturity. The first transaction upon which any of this indebtedness arose, was the sale to defendants of eighty-five barrels of Billings' hams, on the 16th of May, payable June the 4th, for which McKenty took a note for \$4,241,66 ; on the 4th of June he took another for \$4,218,66, payable July 3d, the difference in the amounts being on account of an overcharge of one hundred pounds. Next was on account of a loan made on May 19th, of one hundred barrels of Billings' hams to defendants for the purpose of hypothecation, which he afterwards sold them for \$5,082,21. On the same day he endorsed a note of defendants' for \$5,000, which he paid at maturity, on the 19th of June. The remaining indebtedness of \$11,611,18, was incurred partly by sales of merchandise, and partly by endorsements on defendants' paper. Subsequent to the failure on the 18th of June, defendant Hugg loaned McKenty a note of Moses Ellis, for \$1,100 ; a note of Elliot & Co., for \$450, a note of H. McKenty, for \$350, and \$2,658,43 in cash. The indebtedness to Geo. S. Gladwin & Co. of \$13,492,33, was incurred in the same manner as that of McKenty: that is, by accommodation endorsements, merchandise sold, and money lent.

Defendants' loans with Parrott & Co. averaged about \$15,000 per month, principally on the paper of other merchants. At the time of the failure they were indebted to this house \$8,750, of which, since the 18th of June, \$2,000 was paid, leaving their debt still \$6,750. Their stock in store was valued at about \$53,000, and sold at sheriff's sale for \$43,000. They had about \$130,000 worth of goods on storage, which was all pledged, and also \$55,000 worth to arrive. Their losses appear to have been about \$22,000 by bad debts during the last fifteen months ; \$3,500 by the failure of Earl & Co., and about \$9,000 on liquors, six or eight months before their failure. Their business transactions amounted on an average to \$100,000 per month. Their loans and discounts were about \$57,500 for the same period, at an average interest of two and five-eighths per cent.

The bond of Geo. E. Morgan, Esq., clerk in the U. S. Branch Mint, was put in evidence, in which defendants severally justified, on the 22d of May, in the sum of \$5,000.

Their schedules in insolvency filed on the third day of July were

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also introduced, in which, among the items of indebtedness of the petitioners, occur the following, to wit :

Wm. M. Lent,	. . . . .	\$5,125,00
Geo. S. Gladwin,	. . . . .	13,492,20
U. P. Hutchings,	. . . . .	2,555,00
H. M. Whitmore,	. . . . .	4,883,00
R. G. Hanna,	. . . . .	4,955,43

\$31,010,63

Of which, as has already been stated, about \$15,350 in round numbers, had been paid. Their total liabilities, as set forth in these schedules, amounted in round numbers to \$174,250 ; their total assets to \$91,000. Defendants claimed that this omission in their schedules was accidental, and offered some testimony in that regard.

In the course of the trial, defendants offered to prove by W. H. Hontoon, an experienced and expert book-keeper, that he had examined the books of Gladwin, Hugg & Co. ; that he found that they had been improperly kept ; that, in his opinion, the party who kept the books, by his manner of keeping them, grossly deceived his employers ; that he found various errors in these books, which he can point out in the books themselves ; that all these errors are, without a single exception, against Gladwin, Hugg & Co. ; that he finds many forced balances, and also an error of \$14,000 in an account of stock taken January, 1857 ; that all these entries are in the handwriting of one Allen, a former book-keeper and cashier of Gladwin, Hugg & Co. ; that this proof is offered in reference to all the books, but especially as to the memorandum sales book and large sales book ; also, as to the city ledger, and as to the book containing the accounts of stock ; that the period embraced by these entries is the whole time Allen was with defendants, and that Allen was their book-keeper and cashier. Which offer the court overruled, stating that defendants were at liberty to introduce the books themselves, but that, they not being in evidence, parol proof their contents, or of conclusions deduced from their contents, were inadmissible.

Cook & Fenner, for plaintiffs.

McAllister and Lake, for defendants.

Defendants requested the following instruction, which was given :

In order to convict the defendants of having removed or disposed of their property, or of having been about to do so, with intent to defraud their creditors, the jury must find that such acts of disposal, or removal, were for the purpose of, and with the intent to, defraud the plaintiffs of the demand, to recover which this action is brought.

At the request of plaintiffs the following was also given :

If the jury believe that the defendants have removed, or disposed of, *any* of their property, with the intent to defraud their creditors, they must find affirmatively upon the second issue submitted to them.

HAGER, J., in substance charged the jury,

This action is brought to recover the price of a quantity of pork alleged to have been sold and delivered by plaintiffs to defendants.

As evidence of the bargain and sale, plaintiffs have produced and proven the written contract of February 25, 1857, between the parties, in which is specified two hundred barrels of mess pork, to arrive on the ship John Milton, at \$31 10. Defendants to receive it at ship's tackles, when ready for delivery from said ship, and pay for it in thirty days from delivery. And as further evidence, plaintiffs have proven the delivery order of May 8, 1857, from D. L. Ross & Co., on the commander of the ship John Milton, for two hundred barrels of pork, which is endorsed by plaintiffs to defendants, and by them in blank. It is proven that the ship John Milton arrived here about the 6th of May, and that D. L. Ross & Co. were the consignees ; that the delivery order was presented to the clerk of the ship about the 14th of May, by Mr. Teller, who then held it, the pork having been transferred to him as collateral security for money loaned, and one hundred and eighty-seven barrels of it went into the warehouse of Alsop & Co., on account of Teller, and the balance being in bad condition, went to the store of the defendants. The ship commenced discharging about the 8th of May, and finished about the 27th of the same month. The delivery of these goods commenced on the 13th, and continued to the 16th of May, when all were delivered and received under the order mentioned, excepting two barrels, which were received on the 19th of May. It does not appear that delivery was either claimed or refused at any time prior to the day it was made, or that any lien or claim against the goods was made or existed after the delivery order was given.

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They were in the hands of the carrier, having arrived here about the 6th of May, and upon the order being presented to him, he accepted it, and on the same day commenced the delivery. Previous to this the title to the goods had been transferred, and after the carrier attorned to the order, he became the bailee of the owner of the goods, and ceased to be the bailee of the seller. Nothing remained to be done by the seller to complete the sale or delivery.

Ordinarily, upon the sale of goods, when they are in the hands of a third party, as keeper, and nothing remains to be done to ascertain the price, quantity, quality, or individuality, the sale and delivery is complete upon the giving of a delivery order upon the third party, and an acceptance and readiness, and ability on his part to comply with it.

Now it is claimed by defendants that they had the whole of the 18th of June, the day of the failure, and the day this suit was instituted, for payment, as that was the 30th day after the receipt of the two hundred barrels, on the 19th of May. But if you find the testimony as I have stated, I instruct you that the delivery was complete thirty days before this action was instituted, and that it was not prematurely brought.

It remains for you to determine the amount due, which, in this case, there being no reclamation, is a mere matter of calculation.

The next, and more important, issue for you to pass upon, is, have the defendants, as alleged, removed or disposed of their property, with intent to defraud their creditors, and among them these plaintiffs? The constitution of this State abolishes imprisonment for debt, except in cases of fraud. Under this provision of the constitution the legislature have passed certain laws, authorizing arrests in specified cases; or rather, it is defined by statute what facts shall be established by affidavits, in order to have a defendant arrested on the ground of fraud.

Among others it is provided that, when the debtor has removed or disposed of his property, with the intent to defraud his creditors, he may be arrested. The defendants having been arrested in this action, this question of fraud is submitted to you to be passed upon, to ascertain whether the judgment, if any there be, shall be enforced against the bodies of defendants.

It may be important to give you some instructions as to the legal meaning of fraud. At common law fraud is divided into positive, or

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actual fraud, and what is termed constructive fraud. Positive fraud is defined to be the intentional and successful employment of any cunning, deception, or artifice, used to circumvent, cheat, or defraud another. By *constructive fraud*, is meant such an act, which, though not originating in any evil design, or contrivance to perpetrate a positive fraud, or injury, upon other persons, yet, by its tendency to mislead or deceive them, or to violate public or private confidence, or some special trust; or to injure the public interests, or to operate substantially as a fraud upon private rights, interests, duties, or intentions, is deemed reprehensible, like positive fraud, and therefore prohibited by law. Now, under our insolvent laws, as interpreted by the Supreme Court, any assignment made by an insolvent debtor, contrary to its provisions, is declared void.

An insolvent may make an assignment, in order to prefer certain creditors, which, if it contravenes the insolvent law, may be void; yet he may have acted in good faith, and with no intent to defraud his creditors, and may not, by reason of that act alone, commit a fraud which would render him liable to an arrest. In other words, he may do an unlawful or void act, without committing a fraud within the meaning of fraud, as defined by statute, under the provisions of the constitution referred to. So a person may make a sale of personal property, without a delivery, or change of the possession, which is, by law, declared void, as to creditors, and yet it may be done in good faith, on the part of the buyer and seller, and without fraud. The *intent* of the party is the material thing to be ascertained.

If a debtor disposes of his property in good faith, with no intent to defraud, the contract may be illegal, or void, yet he may not render himself amenable to our statutes authorizing arrests.

The court then referred to the facts and circumstances in evidence, relied upon as badges, or *indicia*, of fraud, and explained to the jury that it was their province to pass upon them, and ascertain whether or no they were satisfactorily explained by the testimony; that it was for them to determine the *intent* with which defendants had acted. Were the acts relied upon as evidence of fraud, for instance, the disposition of a portion of their property, done in good faith, with honest intentions, to protect, secure, or pay certain creditors, or for the purpose of

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committing a *positive*, or *constructive* fraud, as I have defined these, and to defraud their creditors, and among them these defendants ?

Now, in coming to a conclusion on these important questions, and in carefully weighing and considering the very voluminous testimony which has been adduced, you must remember that it is not an easy matter, in all cases, to *prove actual fraud*, even if it has been committed. It is not a fact of itself that can be established by positive or direct evidence—a thing that witnesses can come forward and swear to, as they can to an actual, material occurrence, which is an object of the senses. Fraud is an intention—a purpose—a thought—perhaps not avowed, but concealed within the secret recesses of the heart. It is rather to be inferred from acts, conduct, and circumstances, than proven as a fact. Witnesses can lay before you facts, conduct, and circumstances ; they may be of the opinion that they constitute fraud, but you may come to a different conclusion. Fraud is a conclusion that it is always painful to draw. In a commercial community, from habit and custom, credit seems to be necessary to its existence and prosperity, and good faith is an essential element of credit ; a charge of this nature, preferred against prominent merchants, men who, you have been told, stood in the very first rank in regard to their credit, capacity, and extensive business transactions, merits at your hands the most attentive consideration, and patient investigation ; this is due to the defendants, whose characters and reputations are involved, and to the creditors and the mercantile community, whose interests may be affected.

In regard to the facts of the case, you are the sole judges ; you may credit or discredit testimony as your judgment of its value, and your estimation of the witnesses, may dictate. If you find the positive testimony contradictory, and are unable to harmonize it, you can take into consideration the testimony as to circumstances and presumptions, and find as the weight of evidence may preponderate, and according to the reasonable probability of truth. It is sufficient, as a general rule, if the evidence on the whole supports the hypothesis which it is adduced to prove—and this applies to the defendants as well as the plaintiffs.

In deciding upon the important issues submitted to you, and in the performance of your duties, in arriving at a correct conclusion, you should be guided solely by the testimony. Personal feelings, impres-

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sions received outside the evidence, or the judgment that follows your verdict, you should not allow to influence your minds, or to be taken into consideration. Yours is a duty, of itself, to render a true verdict, as your oath runs, according to evidence, and it matters not who may be the parties to be affected, or what relations you bear to them, what may be the consequences of your verdict to either plaintiffs or defendants, or what you may have heard or read, either in favor of or against defendants; you should banish all such considerations from your minds, and pronounce solely upon the testimony, fairly and honestly, according to the dictates of your consciences. If jurors act otherwise, and permit private feeling, or outside rumor, to sway or control them, in finding a verdict, we might as well abrogate all laws, and close our courts of justice.

The jury gave a verdict in favor of plaintiffs for \$6,300, and in reply to the question, "have the defendants, as alleged, removed and disposed of their property, with intent to defraud their creditors, and the plaintiffs among them?" they returned an affirmative answer.

SEARS vs. HATHAWAY.

Fourth District Court for San Francisco Co., October, 1857.

MALICIOUS ARREST—PROBABLE CAUSE.

Where a person institutes criminal proceedings, *in order to compel* the performance of a collateral thing, as to force the party, against whom they are brought, to pay a debt, in an action by the latter for malicious prosecution, it is not necessary to show either want of probable cause, or malice, on the part of the prosecutor.

In an action of this nature the discharge by the committing magistrate is *prima facie* evidence of want of probable cause, and throws upon the defendant the *onus* of proving that he had probable cause.

This action is brought to recover damages for an alleged malicious prosecution and false imprisonment, for which is claimed the sum of \$20,000. The complaint contains two counts, charging two distinct acts of trespass, for which ten thousand dollars is claimed in each case. The action springs from the failure of Crowell & Co. Upon the 4th of April, 1857, Crowell and plaintiff were arrested upon affidavit of

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defendant, Hathaway, charging both, as copartners, with the offense of "cheating," by "obtaining goods, wares, and merchandise, knowingly and willfully, by false pretenses;" and on the 7th of April, after an examination of Crowell before the police judge, the parties were discharged. On the next day, the 8th, the defendant, Hathaway, caused plaintiff and Crowell to be again arrested, and charged "that on the 4th day of April the crime of concealing property, to defraud and delay creditors, was committed by J. M. Crowell and C. A. Sears," and an extended examination was had before the police judge, into their affairs, who, after deliberating on the testimony in the case for two days, did, on the fifteenth day of April, hold Crowell to answer before the court of sessions, for the offense charged, and a second time ordered that Sears be dismissed.

It is alleged that defendant, Hathaway, in causing both the above arrests, did the same maliciously, and without any reasonable or probable cause, and with the intent to injure plaintiff in his good name, fame, and credit. It is alleged that the other defendants herein joined with Hathaway, in willfully and maliciously prosecuting the aforesaid action, and confirmed all that the said Hathaway had done in the premises, against plaintiff, by agreeing to defray their, and each of their proportion of any and all expenses incurred thereby. And it is further alleged that by reason of said arrest and imprisonment, plaintiff suffered greatly in body and mind, and was obliged to lay out large sums for counsel fees, and has suffered great loss and hindrance in his business, to the amount of \$10,000.

J. M. Crowell had been doing business as a flour and grain dealer, on Clay street, under the firm name of J. M. Crowell & Co., and afterwards removed to Front street. About Dec. 13th last, plaintiff came to the store of Crowell & Co., and talked of going in as a partner. An inventory of stock was taken, and business talked about. A few days after this, plaintiff and Crowell both informed the bookkeeper that Sears would not become a partner. There was some evidence, however, that Sears subsequently represented himself as being engaged in business with Crowell. The firm name was never changed, the books were kept unchanged. Sears did the buying and selling, drew checks in the name of Crowell & Co., signed "J. M. Crowell & Co., by C. A. Sears," and all bills, receipts, and purchases in the same

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manner. On April 3d, 1857, J. M. Crowell & Co. were attached and failed.

It also appears that considerable flour and grain had been purchased by Sears, for J. M. Crowell & Co., from these defendants, on the 1st, 2d, and 3d of April, immediately preceding their failure, and sold by them (some on the same day of the purchase) at prices much below their value. On the 3d, in the afternoon, Crowell bought and paid cash for a homestead, \$4,000. There was some evidence adduced to show that the other defendants in this action agreed and united with Hathaway, to pay their proportion of the expense of counsel fees, and other disbursements, in the several criminal prosecutions against Crowell and Sears.

The following instructions were given at the request of the plaintiff.

1st. A discharge of Sears by the examining magistrate is in itself presumptive evidence of want of probable cause for the prosecution.

2d. If there was a want of probable cause the law infers malice.

The following were asked and given for the defendants.

1st. Unless the jury find there was such an agreement between Hathaway and the other defendants to this action, as amounted to a conspiracy, for the malicious criminal prosecution of the plaintiff, they must find for such defendants.

2d. Unless the jury is satisfied that the affidavits for the arrest of plaintiff, by Hathaway, were malicious, and made without probable cause, they must find for the defendants.

3d. If the jury find that the arrest of Sears, by Hathaway, was without probable cause, but not instituted maliciously; or if instituted maliciously, yet with probable cause, they must find for defendants.

4th. That the discharge, by a committing magistrate, is not conclusive evidence of either malice or want of probable cause.

Plaintiff's counsel entered a discontinuance as to defendants Conro and Berry.

After plaintiff rested, defendant, Hathaway, moved the court for a nonsuit, on the ground that plaintiff had not shown either malice or want of probable cause, in the arrest of plaintiff, and the after proceedings taken thereon.

Motion denied by the court, on the ground that a discharge by the committing magistrate is *prima facie* evidence of both, and throws the

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onus upon defendants, of showing want of malice and probable cause.

Defendants, Little, Moorehouse, Hunt, Hirschfield, and Gordon, moved the court for a nonsuit, on the ground that the plaintiff's evidence was insufficient to sustain the allegations of his complaint as to them.

Motion denied by the court, on the ground that the sufficiency of evidence is always a question for the jury to determine.

In the course of defense defendants offered G. B. Tingley, Esq., an attorney and counsellor, of this State, to prove that defendant, Hathaway, acting in good faith, made a full, fair, and impartial statement of the facts constituting his charge against plaintiff, in the police court, to said attorney, and was by him advised to adopt the course pursued therein; whereupon plaintiff objected, on the ground that advice of counsel may only be offered in evidence when *specially* pleaded in defendant's answer. Objection sustained by the court.

E. Cook and *E. D. Sawyer*, for plaintiff.

Pixley & Smith, for defendants.

HAGER, J.—To sustain an action of this kind, it is necessary that plaintiff should prove, 1st. That he has been prosecuted by the defendants, and that the prosecution is at an end. 2d. That the prosecution was instituted maliciously, and without probable cause. 3d. That the plaintiff has sustained damage.

It appears by the evidence that plaintiff was twice arrested, on a criminal charge, upon an affidavit made by one of the defendants, taken before a magistrate, and after an examination into the matter by him, was discharged. This is presumptive evidence of want of probable cause, sufficient to throw upon the defendants, who were instrumental in procuring the arrest, the *onus* of proving the contrary.

Probable cause for such a criminal prosecution, is such conduct on the part of the accused, as may induce the inference that the prosecution was undertaken from public motives, or such a reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious man in believing, that the party is guilty of the offense charged against him.

The question, probable cause, is composed of law and fact. It is

your province to determine whether the circumstances alleged are true or not, and for the court to determine whether or not they amount to probable cause.

The questions for the consideration of the jury will be to determine if defendants had good reason, as cautious men, to believe that a partnership existed between plaintiff and Crowell. If defendants did so believe, and had sufficient reason to suppose either party guilty, it might make out a defense. The case turns on the question of partnership. On the first occasion Sears was arrested on an affidavit, charging him alone with being a cheat. The question of partnership, would, therefore, have no connection with that count of the complaint—it was a question of probable cause, and the intentions of defendants in procuring plaintiff's arrest. There are two descriptions of malice, malice in fact and malice in law. The former, in common acceptation, means ill will against a person; the latter means a wrongful act done intentionally. This is a question for you to pass upon.

If the prosecution in the police court was undertaken for the purpose of compelling illegally the plaintiff to do a collateral thing, such as to give up his property, it is not necessary for the plaintiff, in such a case, to prove that the prosecution was instituted without probable cause. The criminal and civil laws are distinct branches of jurisprudence, and a party cannot be permitted to employ the former, which is calculated for the punishment of offenders, in order to attain the ends for which the latter is instituted. Criminal prosecutions are, or should be, for the benefit of society at large, and any attempt to deflect them from that object, either to gratify private malice, or to subserve private ends, should not be encouraged.

Damages should be awarded on the principle that plaintiff is entitled to indemnity for the peril occasioned to him in regard to his liberty, the injury to his reputation, his feelings, and his person, and for the expenses to which he has necessarily been subjected; and although no evidence has been given of particular damages, yet you are not therefore obliged to find nominal damages merely, but may make them proportionate to the injury.

The jury found for plaintiff \$4,000 damages.

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ADAMS vs. COHEN.

Fourth District Court, for San Francisco Co., November, 1857.

REFEREE—STIPULATION—REPORT.

In an equity suit where some of the issues of fact were tried before a jury and those remaining by order of court and consent of parties, referred to a referee with instructions to report the testimony etc., it is illegal to change the referee without the consent of the court or all the parties interested.

References of this kind are for the information of the court; to be considered in connection with the verdict in making final decree and judgment, and the testimony should be reported in full in the form of depositions.

Inasmuch as the verdict of a jury in an equity case, may or may not be adopted by the court as its finding, *semble* that this doctrine may be applied to the report of a referee or to any part thereof.

The facts are fully set forth in the opinion.

T. W. Park, for plaintiff.

Hoge & Wilson, for defendant.

Saunders & Hepburn, for receiver Naglee.

HAGER, J.—This is an action in equity against the defendant, the former receiver in the suit of *Adams vs. Haskell & Woods*, still pending in this court. The complaint alleges that defendant received into his possession, as the receiver of this court, certain promissory notes, bills, coin, gold dust, &c., particularly specified; that he was removed from his office, and a new receiver has been appointed; that since the removal defendant has neglected and refused to surrender to his successor in office, the property, &c., that came into his possession as receiver, and to render a just account of his doings in the matter of the trust; and that this action was instituted with consent and authority of this court. Among other things, plaintiffs ask that defendant may be compelled to deliver to the new receiver the property aforesaid, and that an account be taken of the defendant's receipts and disbursements, and he be decreed to pay the balance of money found against him, claimed to be \$450,000. After defendant answered, issues were made up and submitted to a jury to find the amount of coin, gold dust, &c., that came to defendant's hands, as receiver, upon which a verdict was obtained fixing the amount. The remaining issues of fact, in-

cluding those in regard to the notes, bills, &c., that went into defendant's possession, were referred by the court, with the consent of parties, to Wm. Duer, Esq., to report the evidence and facts, &c.

Subsequently, as appears by a stipulation signed by the attorneys of the defendant, and the new receiver, Gilbert A. Grant, Esq. was substituted as the referee, in place of Mr. Duer.

This change of the referee was without the sanction of the court, or, so far as appears, the attorneys of Adams, Haskell, or Woods, or the creditors interested in the fund. Heretofore, I have held, it was the duty, as well as the interest, of the plaintiff to assist in putting a receiver in possession of the property belonging to the estate he represents. The attorneys of the plaintiffs in the suit in which the receiver was appointed, took an active part in this action before and at the trial of the issues before the jury, and were entitled to be heard, in making a selection or change of the referee, and before him after it was made. This change of the referee was illegal and without authority, and only binds those that consented.

The jury having passed upon the question how much coin, &c. went into the hands of the defendant, left the remaining issues as to the notes, &c. undisposed of, and these were referred to Mr. Duer, to report the evidence, with his finding of facts thereon, not as the copy of the order among the papers returned by the referee reads, "his conclusion of law thereon."

The object of the reference was to have the whole facts before the court for its information, to be considered in connection with the verdict, that the court might come to a proper conclusion after argument preliminary, and with a view to a final decree and judgment.

The most material issues referred, as far as respects plaintiffs' relief, appear to have been entirely disregarded, from the fact that no evidence was given or offered on the part of the plaintiffs to sustain them. On the part of the defendant, witnesses were sworn and examined in regard to his disbursements and the value of his services and extracts from the minutes, and a number of documents from the files of the court, were introduced for purposes I am unable to determine. The referee has omitted to have a jurat and certificate, or the signature of the witnesses annexed to the several depositions, which in this case (the order being to report the evidence,) was necessary to give them

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validity. In regard to the minutes and documents from the files of this court, it may be said that the judge takes judicial notice of these, and should best know and be able to determine their contents and condition. It is foreign to the object of this reference, to have the referee report facts and conclusions based upon the records of the court, either in regard to the appointment, acts or proceedings of the defendant as receiver, or as to what has been reported by another referee, upon the matter of settlement of defendant's accounts. Those records will speak for themselves, and can be referred to at any state of proceeding, so far as may be necessary for the due administration of justice. To illustrate the errors the referee has fallen into by undertaking to inform the court, in regard to its record, it is only necessary to state that the one prior report referred to by the referee, was set aside, and after a second order of reference was made, defendant left the State—neglected to proceed under it and embarrassed the hearing so that nothing was done until, so far as the court is informed, long after the commencement of this suit, and the report thereon has never been confirmed.

The referee's conclusions of law are more extraordinary than the finding of facts; substantially they are as follows:

1. That defendant should be allowed disbursements made as receiver, which the referee finds to be \$18,704 53-100.
2. That he is entitled to compensation for his services, which is found to be of the value of \$10,000.
3. That the order of reference heretofore made to pass the defendant's accounts, is a good defense to this action, and entitles him to a judgment.
4. That the defendant in his answer has set up a legal defense, and the action cannot be maintained.

If the referee had possessed the power, and deemed it proper to set aside the verdict of the jury heretofore rendered, the whole case might have been summarily disposed of by a confirmation of the report, and the entry of a judgment for the defendant; but then a question might arise whether or no it should be for the sum of \$28,704 53-100, as found due for disbursements and services, or generally on the ground indicated in the fourth conclusion. The report, as it stands, is neither clear nor intelligible, and I am uncertain what might be the effect of its

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confirmation, as a whole, and I cannot well adopt it in part. The supreme court have held that the verdict of a jury in an equity case, may or may not be adopted as its finding by the court, and probably this doctrine may be applied to the report of a referee, or any part thereof.

It is clear to my mind, that the finding of facts and conclusions of law go beyond the scope of the reference, and are not in conformity with its command; as a whole I cannot confirm or adopt it as the finding of the court. I have considered whether I might adopt it, so far as relates to the value of services, and the amount of disbursements of the defendant, but the question of the value of services was not referred, and I find upon examination of the account, as reported and passed, a considerable proportion of the amount allowed the defendant for disbursements, is for payments made by him after he was out of office, and that it is charged against the fund in court without authority; these, therefore, cannot be allowed.

The subject matter of the third and fourth conclusions of the referee will probably come before the court as questions of law, not of fact upon the final hearing.

Whether or no the effect of the report will operate to preclude the plaintiff, from the farther prosecution of the issues of fact submitted by the order of reference, from the fact that they have failed, or neglected to proceed to introduce proofs before either Mr. Duer or his substitute, may be considered hereafter should it be necessary, independent of the report itself. I have concluded to set aside the report, without prejudice to the rights of the parties.

HORNE vs. HORNE.

Fourth District Court, for San Francisco Co., November, 1857.

DIVORCE—RESIDENCE.

Where a wife leaves her husband and emigrates from another state to this state, without first acquiring a domicile or residence independent of her husband's in the state whence she removes, by the law of this state her residence remains unchanged and follows that of her husband.

People, ex rel. Tallant vs. Tillinghast.

Action for a decree of divorce on the ground of infidelity. The facts are referred to in the opinion.

Jno. V. Wattson, for plaintiff.

Defendant not in court.

HAGER, J.—By the proofs reported by the referee it appears plaintiff and defendant were living together as husband and wife in the city of New Orleans, and that the wife left her husband there and immigrated to this state in the year 1854.

It does not appear that the plaintiff separated from defendant or acquired a residence in Louisiana distinct from his for any period of time prior to her departure. Under the decision of the Supreme Court of this state in the case of *Kashaw vs. Kashaw*, the residence of the husband must be regarded as that of the wife, and in contemplation of law the plaintiff has not resided in this state the period of time required to give jurisdiction of this action.

For this reason the application for a divorce must be denied.

PEOPLE, EX REL. TALLANT vs. TILLINGHAST.

Fourth District Court, for San Francisco Co., October, 1857.

MANDAMUS.

Where a treasurer is prohibited by law from making disbursements until after the claims shall have been approved by certain persons duly appointed so to do, a *mandamus* will not be granted to compel the treasurer to liquidate such a demand not approved, even though the non-approval is through the default of those who should so have done. The remedy should properly be first sought against these latter.

On the 20th of October, 1857, D. J. Tallant and others, commenced this action to obtain a *mandamus* to the treasurer of the city and county of San Francisco, commanding him to make a certain disposition of moneys under his charge, and filed therein an affidavit to the following effect:

That the city of San Francisco, being greatly indebted, the state

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legislature on the 1st of May, 1857, passed an act to provide for the funding and payment thereof.* In pursuance of said act, the debt of the city to the amount of \$1,635,600 was funded and deponent and Wm. Hooper were appointed two of the original commissioners; the other relators, forming the present board of fund commissioners having been since added to fill the vacancies from time to time created in said board. In 1856, prior to making out the general assessment list for that year, the commissioners certified and delivered to the assessor, the amount necessary for the payment of the interest of that year, and demanded of R. E. Woods, then treasurer, this amount and that necessary to paid to the sinking fund in pursuance of section 4, of said act. Although there was then money in the treasury, only \$110,000 paid to the commissioners, being \$39,000 less than the interest for the current year, the residue of which was paid from other funds. Previous to making out the general assessment list of the city and county of San Francisco, for 1857, on the 3d of June, said commissioners certified and delivered to the assessor the amount necessary to be raised for the payment of the interest of the debt so funded in pursuance of said section 4. Taxes for the present year have been paid into the treasury to a large amount. In pursuance of said act, certificates of stock with coupons for interest attached were issued to the creditors of said city, payable at the office of the fund commissioners at the time in the said act specified, and in the manner therein provided. This stock is held principally in Europe, and in the Atlantic States, where the prompt payment of the interest has given it a high character as an investment. Of the said stock has been redeemed, \$176,400 of which amount \$18,800 has been redeemed at par, in 1857, since the delivery to the assessor of the certificates for that year. The sum certified for interest in 1856, was \$149,900, and of the amount for interest and for the sinking fund there remains yet due the commissioners \$89,600. On the 13th of October, 1857, *relators* applied to W. H. Tillinghas', the present treasurer of the aforesaid city and county, for the money which had been received into the treasury and which was then there. Said Tillinghast there admitted that he had \$15,000 in cash besides audited accounts received for taxes and belonging to the general fund

* See laws of 1851, p. 387.

People, ex rel. Tallant vs. Tillinghast.

of the city and county of San Francisco, but refused to pay over the same because the Consolidation Bill* requires that the accounts shall be audited by the board of supervisors of said city and county. Deponents aver that they are informed and believe that the assessor had sent in to the board of supervisors the requisition made for 1857, and that the commissioners although not deeming it necessary or required, yet to obviate all difficulty, transmitted on October 16th, statements of what was required for the interest and the sinking fund, but no final action has been had thereon.

On October 21st, an order was granted commanding defendant to show cause why the payment had not been made and a *mandamus* should not issue, and also an alternative *mandamus* commanding him the said Tillinghast, to pay over \$179,000 as fast as received, or show cause why he should not do so.

The treasurer filed no answer, it having been averred in relators' affidavit that their claim had not been duly audited, upon which admission defendant relied as a cause why the alternative *mandamus* should not be made imperative.

On the 24th, the city and county of San Francisco, answer and pray that they may intervene, they being interested in this, that said city and county by its proper officers, has issued and collected for the present year a large amount of taxes now on hand to answer the demand of creditors of the said city and county; that there is a large amount of indebtedness against said city and county now due upon duly audited demands on said treasurer which said demands were audited and registered, long before the demand mentioned in the affidavit of the relators was presented to the board of supervisors,—that said demand is now in the hands of said board of supervisors to be passed upon in due course by them. That great injustice will be done to the said city and county, and to the creditors thereof,—and that the administration of the government of said city and county will be greatly embarrassed if the said treasurer be compelled to pay relators as they pray. The sum of \$89,000 mentioned in relators' affidavit, if payable at all, is only payable out of the receipts upon the general assessment list of 1856, and that the defendant is not required by law to pay the same out of

* See laws 1857, ch. 334.

People, ex rel. Tallant vs. Tillinghast.

any funds derived from the general assessment list of 1857, and the affidavit and complaint do not allege that there are any funds in defendant's hands derived from the general assessment list of 1856.—The money now in the hands of the treasurer has been collected upon the general assessment list of the city and county of San Francisco.—A large portion of said taxes have been collected from persons residing within the city and county of San Francisco; but outside the limits of the late city of San Francisco, and that neither these persons nor their property were ever bound for the debts of the city of San Francisco; and the taxes raised thereon cannot be separated from the general fund. Defendant is not required to pay the demand of relators.

First, because the act of 1851 is unconstitutional, and

Second, because the several charters of the city of San Francisco have been repealed by the consolidation act, and that relators' demand was not audited in conformity with this latter act.

HAGER, J. In deciding the matter remarked that it was unnecessary to pass upon the questions raised by the intervenors and thought it doubtful whether it was a case for an intervention such as has been made.

The treasurer however in the opinion of the court had shown sufficient cause against making the mandamus preemptory. The act consolidating the government of the city and county is imperative in its provisions in regard to the payment of all moneys out of the treasury. All claims, except in a few specified cases, are required to be presented to and approved by the board of supervisors before payment

This provision in no way conflicts with the act under which the relators, the fund commissioners, are appointed and derive their powers. On the contrary it is a wholesome provision authorizing the proper board having charge of the county and city affairs and finances to exercise such supervision over the execution of the trust created by the last act as is proper and necessary to see and determine that it is exactly and faithfully carried out and that a correct check and account be kept of the moneys that go out of the treasury and in the hands of the fund commissioners.

It does not appear that the relators have presented their claim to the supervisors or that its payment has been authorized by them.

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Until this is done the treasurer by law is prohibited from paying it, and his refusal to do so is no violation of official duty.

When the relators shall have taken the necessary steps and gone through the formalities required by law to entitle them to payment of their claim, probably the treasurer will perform his duty : should he however then refuse he may be compelled to do so by *mandamus*. Should the supervisors refuse to perform their duties the remedy is by *mandamus* against them.

The motion to make the writ of *mandamus* preptory is denied and the proceedings are dismissed.

LANDER vs. SMITH.

Sixth District Court for Sacramento Co., November, 1857.

FOREIGN ADMINISTRATOR—POWER OVER DOMESTIC ASSETS.

The capacity of a foreign administrator to maintain an action for debts due the estate of the foreign intestate, depends upon the *locality* of these assets, as domestic or otherwise.

A foreign administrator cannot maintain an action for domestic assets, because policy demands that domestic assets be administered at home for the benefit of domestic creditors. The fact that the demand is based upon a foreign *judgment*, obtained by the administrator *after the death* of the intestate, does not affect this incapacity.

Under the statute of this State requiring an action to be brought in the name of the real party in interest, for a foreign administrator to bring an action in his own name, and then prove by such a judgment, a debt due the estate of another would be a fatal variance.

The conventional distinction formerly taken between the *localities* of assets, depending upon whether these are debts upon simple contract or are judgments, cannot now be upheld, since these are not regarded as *debts of different degrees*, but *different degrees of evidences* of debt.

A domestic administrator can maintain an action upon a foreign judgment.

On demurrer to the complaint.

———, for plaintiff.

Latham & Sunderland, for defendant.

BOTTS, J.—The plaintiff, describing himself as a resident of the state of Kentucky, and administrator of Elizabeth Dunnington, decess-

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ed, declares upon a judgment obtained by him as such administrator against the defendant, in the state of Kentucky, on the 16th day of May, 1856. To this complaint the defendant demurs, upon the ground that the plaintiff has no right to administer the assets for which he is suing. This is the effect of the demurrer, although the defendant expresses his objection by saying that the plaintiff has no capacity to sue.

I have been a good deal embarrassed by the question raised on this demurrer, and the more that I have not had the full advantage of the well known ability of the counsel on either side.

The counsel for the plaintiff admits that generally a foreign administrator cannot maintain an action for domestic assets; but he claims as an exception to this rule, all that class of demands resulting from promises made to or judgments obtained by the administrator subsequent to the death of the intestate; and to maintain his position he cites the case of *Talmage vs Chapel*, 16 *Mass.* The case is identical with the one at bar, and if the doctrine there established be law, the demurrer must be overruled. But I am not satisfied with this case, and if the principle contended for, is correct, I am certain that it does not rest either upon the basis upon which it is placed by the *Massachusetts* court, or by the plaintiff's counsel.

A foreign administrator cannot sue a domestic defendant, not in consequence of any want of capacity to sue, nor because the domestic courts refuse to recognise his official character; but because the policy of every country demands that domestic assets be administered at home, that they may be appropriated to domestic creditors. The doctrine on this subject originated with the spiritual courts of Great Britain. To the bishop of each diocese belonged the power of probate, and administration; but if the intestate died with *bona notabilia* in two different dioceses of the same province, then was the administration sought from the metropolitan, which would cover all the dioceses of the province. Now, it will be remembered that all England is divided into the two provinces of York and Canterbury; how if one should die with goods or assets in both provinces? Then would there be a struggle for the administration between two separate supreme jurisdictions. In this contest it was held, that the probate granted in one province, was void as to goods in the other; it was, probably, then as

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now, the vultures fighting for the carrion. Disputes arose, too, between the different dioceses of the same province, as to the location of the intestate's effects; as, for instance, if the intestate died in one diocese with a promissory note in his pocket, and the debtor resided in the other; in which diocese were the assets located? These difficulties were finally settled by canons, or enactments, of the convocation of bishops. By these canons, simple contract debts became *bona notabilia* of the diocese where the debtor lived; specialty debts were located where the specialty happened to be at the time of the death of the intestate; judgments or acknowledgments were *bona notabilia* where they were obtained, given or acknowledged. These canons were enacted in the time of James I., by the bishops and clergy in convocation assembled, and were confirmed by the king under the great seal; but they were never confirmed by parliament; consequently, the civil courts never acknowledged their validity. Still the civil courts adopted so much of these canons as they chose to consider exponents of the ancient usage of the church of England. See 2 *Atkyns* 653. For instance, they likened effects in two kingdoms and a foreign administrator, to the ecclesiastical case of two provinces and an administrator appointed by the metropolitan of one of them. The comity of nations required a recognition of the official capacity of the foreign administrator even as it secured a recognition of a foreign judgment; but it was said that this comity did not require the recognition of the right of a foreign administrator to administer domestic assets; these assets being reserved for domestic creditors. It was unreasonable, it was said, to permit a foreigner to withdraw the domestic assets, and thus to remit a domestic creditor to a foreign tribunal, which, in many cases, would be equivalent to a total sacrifice of domestic interests. This would be to carry national politeness a little farther than the courts were willing to extend it. But they, too, in analogy to the doctrine of the ecclesiastical rule, compromised upon the locality of the assets; holding simple contract debts to be the assets of the country where the debtor lived; whilst they agreed that judgments should be considered assets of the country in which the judgment was obtained. These principles are recognized in *Goodwin vs. Jones*, 3 *Mass.*, 513, cited in *Talmage vs. Chapel*.

Thus it will appear that, if there be any difference between cases in

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which the foreign administrator can sustain a suit against a domestic defendant, it does not depend, as the plaintiff's counsel supposes, upon whether the judgment sued on, was obtained by the testator in his lifetime, or his administrator after his death, but upon the fact of the locality of the asset having been changed by the conversion of a simple contract debt into a judgment. Nothing is more artificial than the reasoning of the plaintiff's counsel, that the foreign judgment having been rendered in the name of the administrator, he may sue on it in his own name, and that his description of himself as administrator is mere surplusage. Certainly under our statute, which requires the action to be brought in the name of the real party in interest, to sue in his own right, and prove a debt due the estate of another, would be a fatal variance. It is true that in some cases, as for the recovery of property belonging to the estate tortiously taken from his custody, he may sue in his own name; so also may any other bailee; for a promise to him to pay a debt due the estate, he may sue in his own name; so may the factor of a foreign house sue for a debt due the principal; but in either suit I apprehend the executor or agent is only a nominal plaintiff, and the defendant may set up in such a suit, any equities against the estate, in the one case, or the principal in the other. If it were true that the administrator could sue upon a judgment obtained by him as administrator in his own right, without regard to the estate, it would follow that the defendant could offset any claim against the individual, and so defeat the claim of the estate for whose real benefit the suit is brought.

I have labored upon this case the more, because this abstruse question turns wholly upon the basis of the distinction between suits brought by an administrator upon simple contract debts, and those that have ripened into judgments.

But if the distinction is founded, as I think it is, upon the conventional locality of the assets; and this is based upon the obsolete idea of the higher dignity of specialty and judgment debts, what becomes of this doctrine, when this distinction no longer exists? Now, when no distinction is drawn between the dignity of a promissory note and that of a bond (since notes, specialties and judgments are considered not *debts of different degrees*, but only *different degrees of evidences of debt*,) what becomes of a doctrine founded on the old view, consid-

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ered by the new light? The noblest of all sciences must not be permitted to lag in the march of improvement; an error can only be reformed, by overthrowing all its consequences.

If, then, the true principle be, that it behooves every government to protect its own citizens, and for this purpose it is necessary that assets within its jurisdiction, be administered under the supervision of its own courts, in order that they may be made to respond to the claims of domestic creditors, then it follows, that this suit should not be sustained, if a judgment in favor of the plaintiff would have the effect of withdrawing local assets from the reach of domestic creditors. Suppose the judgment sought were to be obtained, what would be the result? It would be satisfied out of the effects of the debtor then in California; the money shall be made and in the hands of the sheriff; does not this money become assets of the estate located in California, and shall a foreign administrator be permitted to withdraw these assets from the jurisdiction of our courts, without accounting to our own citizens to whom the estate may be indebted? In *Vaughn vs. North-up*, 15 *Peters*, it was held that an administrator in one state could not be sued in another; then it follows that if this suit be permitted, we have a suitor who cannot be sued.

It has even been doubted whether a domestic debtor could defend by plea of payment made to a foreign administrator; although in *Doolittle vs. Lewis*, 7 *Johns. Ch. R.*, chancellor Kent held such a payment good. I cannot see the substantial difference between permitting a foreign administrator to withdraw assets belonging to the intestate at the time of his death, and those becoming assets by process of law after the death of the intestate. It is useless to give the plaintiff a judgment, if the effects of the judgment can only be administered by a domestic administrator. It is urged that a domestic administrator cannot sue upon the judgment; but if I am right, the effect of this judgment is to conclude the liability of the defendant to the estate, and the question is, simply, by what agent or trustee shall the debt be collected? In this view, the judgment would be as available to the domestic as the foreign administrator.

Upon a full consideration of the case, somewhat in the face of authority I confess, I am inclined to sustain the demurrer. Let judgment be entered accordingly.

Waters vs. Moss, Trustee.

WATERS vs. MOSS, TRUSTEE.

Sixth District Court for Sacramento Co., November, 1857.

DAMAGES—NEGLIGENCE.

In an action of trespass to recover damages for injury sustained, the plaintiff must not only prove that it resulted from the negligence of the defendant, but also that it was in no wise, however slightly, the consequence of his own carelessness or passiveness.

The facts are sufficiently set forth in the opinion.

BORRS, J.—This is an action of trespass, in which the plaintiff claims damages for the loss of a horse, killed by the careless and negligent conduct of the defendant's servants, while engaged in and about defendant's business. A jury having been waived, the facts as well as the law were submitted to the judgment of the court.

As matter of fact I find that on the — day of — 1857, the defendant was in the possession of the franchises, and other property of the Sacramento Valley Railroad Co., and was engaged in running the cars and engines on said road between the towns of Sacramento and Folsom; that on the said day the horse of the plaintiff fell on said track and was struck and killed by said cars under the control and management of the defendants' servants; that the accident occurred at a point three or four hundred yards from the place at which the county road crosses the railroad, at an hour at which the cars pass daily this portion of the road; that the plaintiff's horse was wandering along the public road without superintendent or conductor; that the horse being frightened by the approach of the engine and cars left the public road and went upon the track of the rail road; that the horse fell in the attempt to leap over an open culvert in the road about fifteen feet wide; that this culvert was negligently and improperly left uncovered by the defendant; that the culvert was the remote cause of the horse's death, and that the accident might not have occurred had the culvert been closed at the top; that the engineer in conducting the train used all possible care and diligence to prevent the accident; that the accident was in part attributable to the negligence and carelessness of the plaintiff himself; that the horse was worth four hundred and fifty dollars.

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I take the common law to be, that to enable the plaintiff to recover in an action of this kind, he must be free from blame himself ; that is, if the occurrence complained of resulted partly from the carelessness of the plaintiff, and partly from the unskillful and negligent conduct of the defendant, the plaintiff shall not recover. The law requires a man to use reasonable care and caution to prevent injuries of an accidental character occurring to his property : it will not permit a man relying upon legal redress to fold his arms and suffer an injury which by prudence he might avoid. No matter how slightly this passiveness or imprudence may have contributed to the occurrence, if it contributed at all, the common law affords the sufferer no redress. This rule may seem to be a harsh one ; but it certainly has a tendency to quicken the wits of the community, and to prevent litigation. Be that as it may, it is the rule, and all we have to do is to determine its applicability to this case. The plaintiff permitted his horse to stray toward that part of the railroad which is crossed by the highway, which is common to the use of the public and the company, at an hour in the day when the cars usually passed, at a rapid rate over that portion of the road ; and in this he was certainly careless and imprudent. If the horse had been attended by the plaintiff himself and under his control, it would have been equally his duty as that of the engineer to look out for and avoid a collision ; and if he will leave a poor brute without the guide of reason to incur such perils, he at least cannot complain of the consequences.

It is urged that great public inconvenience would result from the establishment of a rule that would require the owners of cattle along the line of a railroad to keep a look-out for the preservation of their stock. This may be a circumstance to induce the legislature to abolish railroads, or to encumber them with such conditions as may render this supervision upon the part of the graziers unnecessary, but it can have no weight with a court, whose duty is to construe the law without regard to the inconvenience that may result to any or all classes of the community.

Let judgment be entered for the defendant.

McHenry vs. Martin.

MCHENRY vs. MARTIN.

Twelfth District Court, for San Francisco Co., October, 1857.

ASSUMPSIT.

The fact that A. did not deny the existence of a certain indebtedness, charged against him by B., at a time when they were engaged about a different matter, is not sufficient evidence in an action in *assumpsit*, brought by B., to sustain an averment that A. was indebted to him in an amount different from that which A. did not deny, and with interest.

Whether or not it would sustain an action at all, *quære*?

The facts are sufficiently stated in the opinion.

S. H. Dwinelle, for plaintiff.

C. J. Hughes, for defendant.

NORTON, J.—The complaint avers that the defendant is indebted to the plaintiff in the sum of \$275, with interest, at the rate of two and a half per cent. per month. The case was referred to a referee, and the only evidence adduced to sustain plaintiff's claim, merely established the fact, that he and defendant went together to a place to sign a bill of sale, and that while there, the former remarked that defendant owed him \$400, which the latter did not deny. I do not see how this evidence can sustain the above averment of the complaint. This sets forth a specific contract, that defendant owes plaintiff the sum of \$275, with a specified amount of interest, which it is averred defendant promised to pay at a particular time. This allegation is not broad enough to be sustained by the mere fact that the defendant did not deny that he owed \$400. The other circumstances diminish the effect of this silence still further, for it does not appear that the occupation at the time, had any connection with the subject of their indebtedness in question, and that they were merely engaged about a bill of sale. But independent of this nature of precision of this allegation in the complaint, I think that on broader grounds, a person can hardly be held liable to pay a debt simply because he did not deny its existence when charged, and that at a time when the debt, if it existed at all, was not the subject of consideration.

The report of the referee is set aside.

Robinson vs. Coady.

ROBINSON vs. COADY.*

Twelfth District Court, for San Francisco Co., October, 1857.

DEMAND.

Where a demand at a certain place is necessary, an averment that the plaintiff was there, ready and willing to receive payment, is insufficient.

The facts are set forth in the opinion.

J. P. Treadwell, for plaintiff.

E. Casserly, for defendant.

NORTON, J.—This case comes up on demurrer to the complaint. This should have averred that payment of a certain promissory note was demanded, at a certain particular place, in this State. This the plaintiff has endeavored to avoid, by saying that he was at the place in question, at the proper time, ready and willing to receive payment. This averment is insufficient. Demurrer sustained.

MEYER vs. KINZER ET UX.*Twelfth District Court for San Francisco Co., Oct. 1857.*

COMMON PROPERTY.

Where a note and mortgage are executed to a husband and wife, to secure the purchase money of land sold by them which was common property, it raises no presumption that he intended the moiety of the note and mortgage as a gift or advancement to her, but the note and mortgage are common property.

The case is submitted upon a stipulated statement of facts, which are substantially as follows: G. W. Kinzer on the 6th of December, 1857, being then married to his co-defendant, bought in his own name, the property now owned and held by plaintiff. On October 1st 1853, Kinzer and wife joined in a deed conveying the property to one J. H. Gager, who, on the same day, executed a mortgage to them to secure

* *Supra* 179.

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them in the payment of a promissory note then given by him for that portion of the purchase money. Kinzer assigned and delivered this note and mortgage to one A. H. Lemmen, and while in whose hands, on September 25, 1855, Gager paid it, and thereupon received from Lemmen the said note and the mortgage deed, duly canceled and released. On the 16th of July 1856, plaintiff bought this property from Gager, and free apparently from this mortgage.

Rose & Johnson, for plaintiff.

J. B. Hart, for defendant.

On the above facts plaintiff's counsel contended, That under the act of April 17, 1850, defining the rights of husband and wife, (*Comp. L. * 812 §2*.) the property as bought by Kinzer in December 1857, was common property. That it can only be conjectured that the wife joined in the deed to Gager, because the purchaser *ex abundante cautela*, required it. That the conveyance to, and mortgage by him, are in law considered as one act. (*Guy vs. Carriere*, 5 *Cal.* 511.) It was as though the deed of conveyance had contained a reservation of a lien for the unpaid portion of the price, in conformity with the practice in some of the States. That the mortgage was the common property of the Kinzers, husband and wife, and as such, subject to the control of the husband. A very similar case was decided in *Texas* under nearly identical provisions of that state; (*Parker vs. Chance*, 11 *Texas* 513, also *Yates vs. Houston* 3 *ib.* 433, *Burns vs. Wideman*, 6 *ib.* 232.) For the law defining marital rights in *Texas* see *Hartley's Dig.* 134-8; (see also 2 *Bright Husband and wife*, 678, *Laws passed by the 2nd leg. of Texas vol. 2 part 1 pp.* 77,79.) Such also, has been the interpretation of our own law. (*Joyce vs. Joyce* 5, *Cal.* 161.) *Louisiana*, *Texas* and *California* have taken this law of the community of property from the Spanish law, and the two latter have conformed thereto, as interpreted in the former and by the Spanish commentators (*Smalley vs. Lawrence* 1 *Rob. Louis*, 214, *ib.* 367, 17 *ib.* 303, *Febrero Mejicano*, *Lib.* 1, *Tít.* 2, *Cap.* 10 §§1 & 6.) The title being in the wife's name, does not raise even a presumption in her favor (*McIntyre vs. Chappell*, 4 *Texas*, 127, *Love et ux. vs. Robinson*, 7 *ib.*, *Huston vs. Carl*, 8 *ib.* 240, *Scott vs. Maynard et ux.*, *Dallam* 548.)

*Wood's Cal. Dig. 487§2606.

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It will be contended that the case is governed by the common law, and that the facts recited in the stipulation, raise the presumption of a gift by the husband to the wife ; so it was contended in the cases cited from 11 *Texas* 512, and 5 *Cal.* 161 and, also *Thomas vs. Chance* 11 *Texas* 634.

But if the consent of the husband to the mortgage being taken in their joint names, sufficiently indicated his intention that the moiety thereof should be deemed a gift or advancement to her, then by the common law, it would only have been good against his heirs at law, in case she should have survived him, (1 *Bright's Husband and wife* 32, no 15, *Christ Hospital vs. Budgin*, 2 *Vesey*. 683, *Flesk vs. Cushman* 6 *Cushing* 20, *Amos vs. Chew*, 5 *Metcalf* 320.) But on the supposition of the gift to the wife of the chattel interest involved in this case, she should have taken, and have kept possession of it, or of the evidence of it. (*Comp. L.* 201 §15.)*

J. B. Hart, contra.

At common law where a man makes a purchase, and conveys to a member of his own family, the presumption is, that it is intended as a gift or advancement to such member (2 *Maddock. Ch.* 112.) If the purchase is made in the name of the son, it is considered an advancement, unless a different intention is established by proof. (*Elvan vs. Duncan*, 2. *Ch. Cases* 26. *Boyd vs. Reed* 1 *P. M. W.*) The presumption is stronger if the purchase is made in the name of the wife, or in the name of himself, his wife and his daughters (2 *Fonbl. Eq. B. Ch.* 5 & 3, *Back vs. Andrew*, 2 *Vern*, 120, *Cook vs. Hutchinson*, 1. *Keen*, 425; 2 *Story Eq. Jur.* 1205, *Dyer vs. Dyer*, 2 *Cox* 92.)—The mortgage being executed by Gager to the husband and wife, the presumption is that half of it is her separate property. The execution and delivery of the mortgage vested in the wife her moiety of it, and placed that part of it beyond the reach and control of her husband. Section 2, of the act defining marital rights (*Comp. L.* 812) does not prevent a wife accepting a gift from her husband. The character of the act and the presumption of law apply at the time of the mortgage, and no subsequent act of the husband can change the wife's rights ; they are vested and beyond his control when the pro-

*Wood's Cal. Dig. 107§403.

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perty is placed in her name (Cond vs. Lancaster Bank, 3 *Ohio* 9, and authorities then cited.)

NORTON, J.—In this case the complaint is filed to obtain a decree to quiet title. There is a slight inaccuracy or informality in it where the plaintiff avers his *possession* of the property in controversy. The allegation is, that he is the owner and *occupier* thereof, and not that he is in *possession*. As this however appears to have been purely accidental, the averment is sufficient upon this point. It seems Kinzer's wife joined in the deed conveying the property to the grantors of plaintiff, though for what reason the joinder was made, it may be a little difficult to conjecture, for the property being then held in common by her husband and self, it was subject to his right of disposition. A mortgage was given by the purchaser to the vendors at the time of the sale, which was subsequently assigned by Kinzer, and which in the hands of the assignee was paid by the mortgagor, who subsequently conveyed the property to plaintiff. Mrs. Kinzer in her answer now claims a moiety of the amount to secure which the mortgage was given, contending that by the common law, the presumption arising from the fact of the mortgage having been given jointly to her and her husband, is, that he intended it as a gift or advancement to her. There is no such inference to be drawn. The principles of the common law in reference to the property of husband and wife, do not apply to the rights of this relation, as it exists under our statute. The note and mortgage given by Gager upon the sale by Kinzer, were common property, and as such subject to the husband's disposition. The possessions of the husband and wife, when they have once acquired this character of common property, retain it until it shall have been expressly divested by some act, unequivocally evincing an intention that this shall be its effect. The property must be conveyed directly to the wife, to her separate use and benefit. By the common law, the husband would, in this case, having reduced the chattel interest to possession, be entitled to sell it or to dispose of it otherwise, according to his discretion. At all events in the present instance, the note and mortgage being common property at the time of the assignment by Kinzer, he could do what he pleased with them, and when he did assign them he conveyed the interest of his wife as well as of himself, and she therefore can no longer claim any estate in the premises.

Let decree be entered as prayed for in the complaint.

Hardy vs. Hunt.

HARDY vs. HUNT.

Sixth District Court, for Sacramento Co. November, 1857.

LIABILITY—BAILEE—AGENT—DEBTOR.

The bailee of money deposited for safe keeping by one in his own name, who had received it from a third party for the purpose of making a bet, according to the instructions and for the benefit of such third party, but who was not directed by the third party so to deposit the specific sum, with such bailee, is not liable for the same to such third party, in an action brought by the latter to recover the amount of the deposit.

Whether or not the bailee will be so liable, depends upon the relation of the depositor to the third party as agent, as bailee or as debtor, which depends upon whether or not the depositor and third party treated the money as specific property or as currency.

If the third party, when he parts with the money, contracts for the return or re-delivery thereof to another, the depositor is his agent, or bailee, and he retains his property in the coin in the hands of the second bailee; but if he so contract for the equivalent of the money, in any currency, he makes the depositor his debtor and parts with his property.

The facts are fully stated in the opinion. On trial before the court without a jury.

Smith & Hardy and Long, for plaintiffs.

Winans & Hyer, for defendants.

BOTTS, J.—This is an action, charging the defendant with money had and received to the plaintiff's use. A jury having been waived, it devolves upon the court to determine the facts and apply the law.

First for the facts. On the — day of August, 1857, the plaintiff gave one O'Brien a check upon B. F. Hastings, drawn payable to O'Brien's order, for the sum of five hundred dollars, requesting O'Brien to bet that amount for him, the plaintiff, with one Harris, upon the approaching election for sheriff of the county of Sacramento. O'Brien undertook to make the bet for the plaintiff; the plaintiff charged O'Brien to make the bet in his own name, without disclosing the plaintiff's connection with it. O'Brien proceeded to the banking house of Hastings, drew the money, and put it in his pocket, together with a

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small amount of his own ; he left the bank, made the bet, and returned with Harris in a few moments ; it was agreed that O'Brien and Harris should deposit with the defendant, Hunt, a clerk in the bank, one hundred dollars, each, as a forfeit, and that the other four hundred should be deposited with Hunt, as stakeholder, on the following Monday. O'Brien then deposited four hundred dollars with Hunt to be held by him as stakeholder, in the event Harris put up his four hundred on Monday. The terms of the bet were reduced to writing, made in the name of Harris, on the one part, and of O'Brien, on the other, and signed by both of them.

On the first day of September, 1857, attachments, issuing out of the justice's court of — township, in suit against O'Brien, were served upon Hunt, under the 126th section of the practice act. By agreement between O'Brien and Harris, the latter was permitted to withdraw his five hundred dollars from the hands of Hunt. After the attachment was levied upon Hunt, he was informed by O'Brien that the bet was made by the plaintiff, and Hunt replied that he had suspected as much all along. The suits against O'Brien, in the justice's court, went to judgment, and upon "proceedings supplementary to execution," Hunt was cited before justice Jenks, by whom the judgments had been rendered. At this examination, Hardy, the plaintiff, desired to appear by counsel, but was informed by the justice that he had no standing in court. When Hunt appeared before the justice he was aware of Hardy's position. Upon a statement of the facts, Hunt was ordered to pay over, and did pay over, to the judgment creditors of O'Brien, the sum of \$422 30, and the balance of the five hundred dollars he paid over to the plaintiff, without prejudice to the merits of this controversy.

The first, and, in my opinion, the only question arising upon these facts, is, does any privity exist between the plaintiff and defendant, upon which this action can be maintained ? That the principal can sue upon the contract of his agent, is indisputable, and no court in christendom has gone further to uphold this doctrine than did the supreme court, in the case of *Ruiz Hermanos vs. Norton*.* But here two things are to be remembered : First, that this doctrine rests upon the right

*4 Cal. 355.

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of property in the unknown principal, which has been transferred ; and, secondly, that the contract between O'Brien and Hunt was made without the knowledge or authority of the plaintiff. Had Hardy requested that the particular money, or check, that he gave O'Brien, should be deposited, in his name, with Hunt as a stakeholder ; and had it been so deposited, I have no doubt this action could have been maintained. Or, had Hardy, instead of money, given O'Brien a horse, with directions to bet him on the election, and the horse had been deposited for this purpose with Hunt, even in the name of O'Brien, it is probable that the plaintiff could have maintained an action of trover for the horse ; in such a case, he would recover, not by force of any contract, express or implied, but by virtue of his ownership of the property in the possession of the defendant. Very different would it have been, had he delivered the horse to O'Brien, as he did the check, to be converted into *money*, with directions to bet the money. By such a proceeding, he put into O'Brien's hands, not any specific money, which it was his duty to keep separate and apart from his own, the bailor thereby preserving his title to the specific money, but he entrusted him with money, generally, to be accounted for, which the bailee, without a breach of trust, could mingle with his own, as he did, and which he could account for, as well by the return of any other money, of a similar amount, as of the particular proceeds of the check. What was this, but making O'Brien his debtor ? And how can it be said, that O'Brien was the plaintiff's agent, in respect to any particular money ?

Much learning has been expended in the attempt to draw the line between general and specific deposits. The cases have arisen mostly under assignments, by bankrupt bankers. When the customer deposits specific property, to be returned in specie, so long as the property can be ascertained and traced, he will have a right to his specific property ; hence, money, in a sealed bag, which can be identified, or even coin marked for the occasion, being specially deposited, never goes to the assignees as the effects of the bankrupt. The banker, in such a case, is a mere bailee, and the property remains in the bailor. On the other hand, if one deposits with a banker a sum of money, with the understanding that the banker is to account to him, not for the specific money, but for the specific sum, then does he become a creditor, and the money deposited by him an hour before, even if it were

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marked and traceable, passes to the assignees, with the general effects, and the unfortunate depositor is classed in the category of the insolvent's creditors.

It is sometimes said, that one man can have no property in money in the possession of another, because "money has no ear-marks." This is a metaphor used to distinguish a debtor from a bailee, and perhaps it is significant of the danger that would result from permitting the testimony of the bailee to establish the identity of money, uncorroborated by any peculiar marks impressed upon it. Possibly this was what Lord Mansfield alluded to, when he said, 1 *Burrows*, 457: "It has been quaintly said, that the reason why money cannot be followed, is because it has no ear-marks; but that is not true. The true reason is, on account of the currency of it."

Courts, of equity especially, have gone very far in upholding the right of property in the original owners of money, where it has been purchased by an agent, even after the money had been mingled, and intended to be mingled, with the funds of the agent or bailee; but in such case, I apprehend, the investment must have been made in the name of the principal, or by his direction. Thus, had Hardy given this money to O'Brien, for the purpose of buying a particular horse, and O'Brien, even after mingling the money with his own, had purchased the particular horse with the exact sum delivered to him, these circumstances, perhaps, would have been held sufficient to raise a trust by implication of law, and the right of property might have been recognized in the *cestui que trust*. But there is no specific property in this case at all. Hardy trusts O'Brien with money, generally, and O'Brien, after mingling this money with his own, contracts with Hunt, whereby, in a certain event, Hunt is to account to him, not for the specific money deposited, but for a similar amount. All the way through, both by Hardy and O'Brien, the money bailed is treated as currency, and not as specific property. It would never do to permit a factor or agent to mingle and separate the unmarked money of his principal at his pleasure; for, by this means, every commission-merchant might ward off an execution, by declaring that the money attached was the proceeds of the goods of A. or that the goods levied on were purchased with the money of B.

I have endeavored to show that the plaintiff and O'Brien bore to

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each other the relation of creditor and debtor, and not that of principal and agent, or of bailor and bailee ; the difference being, inasmuch as money is either specific property, or currency, as the owner may choose to make it when he parts with it ; if, in the delivery, he contract for the return or re-delivery to another, of the identical coin, he retains the property and makes the person to whom it is delivered his agent ; but if he contracts with the bailee for the return or delivery to another, not of the specific money but of its equivalent in any currency, he consents to part with the property, and make the bailee his debtor. In the first case, if he can trace the money, he shall have it ; in the second, he has thrown it into the currency, and shall never reclaim it.

In this point of view, it becomes unnecessary to determine whether, as was held in the case of Ball vs. Gilbert, 12 *Metcalf*, cited by the defendant, the wager being unlawful, was absolutely void, and the deposit therefore, liable to the attachment of O'Brien's creditors ; or, whether, as contended for by the plaintiff, the title in the money, at the time of the attachment, was in the stakeholder, awaiting the happening of a contingency, which might, or might not, vest it in O'Brien. It is true, it was urged that, if the money was not subject to the attachment of O'Brien's creditors, the plaintiff might recover, by virtue of the direction given Hunt by O'Brien, to pay the money to Hardy. To this, it is sufficient to say, if Hunt owed O'Brien, and if the information conveyed by O'Brien to Hunt, of Hardy's claim, could be construed into an assignment of the debt, no such debt, and no such assignment, are alleged in the declaration.

Let judgment be entered for the defendant.

Russell vs. Conway.

RUSSELL vs. CONWAY.

Twelfth District Court, for San Francisco Co., October, 1857.

OFFSET—COMPLAINT.

A judgment against a vessel will be offset against a judgment obtained by the owner of the vessel against the first judgment creditor.

In a bill filed by the owner to obtain such an offset, a description of the vessel as "the property of plaintiff," is a sufficient allegation of ownership.

The complaint in this action alleges, substantially, that plaintiff, Russell, brought an action against the defendant, in the United States District Court, to recover damages sustained by the bark "Madonna," belonging to plaintiff, by a collision with the "Elvira," the property of the defendant; that the "Elvira" was seized and released; that in said action plaintiff recovered, on the 7th February, 1855, \$1640 damages, and \$286 65 costs, against defendant, and the two sureties on the release bond; that they are all three insolvent; that on the 22d of September, 1855, Conway obtained a judgment for the same cause of action against these plaintiffs in this court, for \$1226 13, and for \$122 50 costs; that defendant, Scannell, as sheriff of this county, is about to collect the same; that defendant, Brooks, claims to be the owner of the said judgment against plaintiffs; that this assignment was made to defeat plaintiff's right of set-off; that plaintiffs are unable to collect their decree against Conway, and the two sureties; that Conway's judgment now amounts to \$1700, and plaintiff's decree to \$2300; that plaintiffs are bound to pay the amount of said judgment; wherefore they pray for an injunction, restraining Scannell from collecting the same; that upon final hearing the same be made perpetual, and that their decree be set off against the judgment of Conway.

The complaint is demurred to on the grounds, first, that it does not set forth a sufficient cause of action; and second, that the court has not jurisdiction in the premises.

Pending the action a motion was made to dissolve the injunction, when the merits of the action were argued.

Whitcomb, Pringle & Felton, for plaintiffs.

Russell vs. Conway.

B. S. Brooks, for defendants.

B. S. Brooks, for the motion :

I. It is not alleged that the defendants have any claim against the plaintiffs, nor do they pretend to have any. 2 *Story Eq. Jur.*, §1437; Aiken vs. Satterlee, 1 *Paige*, 289; Lindsay vs. Jackson, 2 *ib.*, 582; Gay vs. Gay, 10 *ib.*, 376; Murray vs. Toland, 3 *Johns. Ch.*, 374; Dall vs. Cook, 4 *ib.*, 11; Graves vs. Woodbury, 4 *Hill*, 560; Collins vs. Evans, 1 *Dev. & Bal. Eq.*, 306; Bunting vs. Richs, 2 *ib.*, 130; Clark vs. Cost, 1 *Craig & Phil.*, 154; Howe vs. Sheppard, 2 *Sumner*, 409; Genley vs. Jones, 6 *J. J. March*, 153.

Nor is it even alleged that plaintiffs are owners of the "Madonna," against which defendant's judgment is taken.

II. Plaintiffs allege that in another court they obtained judgment against the "Elvira," for a collision by the "Elvira" against the "Madonna;" but, by the judgment of this court, it appears that the "Madonna" caused the collision, which record they cannot evade.

III. The right of set off in equity is in the discretion of the court. To admit a set off of plaintiff's judgment would be to admit its equity, and of necessity the injustice of the judgment of this court. Can this court thus stultify its own decision? Davidson vs. Geoghagan, 3 *Bibb*, 233; Scott vs. Rivers, 1 *Stur. & Porter*, 24; Burns vs. Thornburgh, 3 *Waits*, 78; Tolbert vs. Harrison, 1 *Bailey*, 599; Coye vs. State Bank, 3 *Hal.*, 172.

IV. Defendant's judgment having been obtained after plaintiff's, and, it is alleged, for the same cause of action, plaintiffs should have pleaded their judgment in bar of the action against them, and having failed to do so, have no standing in a court of equity.

V. Their submitting to a second trial in this court was a *waiver* of their decree, obtained in admiralty, and was like voluntarily assenting to a new trial.

VI. There was no right of the plaintiffs to a set off when the assignment to the defendant, Brooks, was made. If he had collected the judgment, he would have been entitled to appropriate the money to pay the debt due him from Conway.* Having secured also the legal

* For legal services rendered in the conduct of the cause

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title, his right is superior in equity. *Howe vs. Sheppard*, 2 *Sum.*, 409; *Makepeace vs. Coats*, 8 *Mass.*, 451; *Williams vs. Evans*, 2 *McCord*, 203; *Duncan vs. Bloomerstock*, *ib.*, 318; *Graves vs. Woodbury*, 4 *Hill*, 561; *Tallant vs. Harrison*, 1 *Bailey*, 599; *Duncan vs. Calhaitte*, 1 *Browne*, 47.

VII. If there was any validity in plaintiffs' judgment, they should have assigned it to the present owners of the "Madonna," or to whoever else is liable to pay it. *Gilman vs. Slycksal*, 7 *Cowen*, 469; see also 2 *Story Eq. Jur.*, §§ 1435-36; *Green vs. Darling*, 5 *Mason*, 201; *Pierson vs. Meany*, 3 *A. K. Marsh*, 6; *Hackett vs. Connett*, 2 *Edw.*, 73; *Wythe vs. O'Brien*, 1 *Smi. & Stu.*, 551; *Smith vs. Londerstal*, *Barb., S. C.*, 696; *Miller vs. Rec. of Franklin Bank*, 1 *Paige*, 444; *Runson vs. Samuel*, 1 *Craig & Phil.*, 154; *Mahon vs. Scully*, 2 *Hogan*, 194.

Whitcomb, Pringle & Felton, opposing the motion :

I. A bill in equity is the proper proceeding to set off two debts, where there is any claim of a third party to interfere with an ordinary motion for a set off. *Simpson vs. Hart*, 14 *Johns*, 74; *Gay vs. Gay*, 10 *Paige*, 369; *Barbor vs. Spencer*, 11 *Paige*, 517.

II. The party should proceed in the court where the judgment against him is obtained. *Cook vs. Smith*, 7 *Hill*, 186.

III. The parties against and in favor of whom these judgments are obtained, are substantially the same. There is as much identity as exists in the case of *Barrett vs. Barrett*, 8 *Pick.*, 341, and *Driggs vs. Rockwell*, 11 *Wend.*, 504. The "Madonna" is a mere nominal party. A judgment against a party's property is a judgment against him, for here he cannot be held but by his property.

IV. As to the assignment to Brooks, see *Practice Act*, § 5; *Green vs. Hatch*, 12 *Mass.*, 195; *Jenkins vs. Brewster*, 14 *ib.*, 294; *Jones vs. White*, 13 *ib.*, 307; *Barbor vs. Spencer*, 11 *Paige*, 517; *Gay vs. Gay*, 10 *ib.*, 396; *Duncan vs. Bloomstock*, 2 *McCord*, 318; *Williams vs. Evans*, *ib.*, 203.

V. An assignment to defendant's attorney cannot defeat plaintiffs' right of set off. *Cooper vs. Bigelow*, 1 *Cowen*, 206; *Crocker vs. Claughly*, 2 *Duer*, 684; and particularly *Morris vs. Hollis*, 2 *Har-rington*, (*Del.*) 4.

NORTON, J.—This is a bill addressed to the chancery powers of the

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court, to offset judgments. It appears that defendant, Conway, is insolvent, and a wholly irresponsible person. It is well settled, upon authority, that in cases of counter claims of this kind, between two parties, and especially if one is insolvent, courts, endowed with chancery powers, will employ them to offset the claims at the instance of the responsible party; and the bill being filed by Russell in this instance, it presents a proper case for the exercise of the equity jurisdiction of the court. There are several objections, which have been raised by defendant's counsel, of which the principal is, that the action in which Conway obtained his judgment, was not against Russell, but against the "Madonna." But the judgment is substantially against Russell. Making a vessel a defendant is but a legal fiction. The owner is the real party.

The fact that the act which authorizes this proceeding, also allows *him* to come in and defend, and requires the surplus proceeds of a sale to be paid to him, would seem to show that the law contemplates him as the real defendant, to such an extent, that, in an action like the present, this objection cannot be well sustained. The next point is, that, even if it be conceded that a judgment against a *vessel* will authorize her *owner* to offset it, yet in this case it is not distinctly averred that plaintiffs are owners of the "Madonna." Although this is not done in express terms, yet it is alleged that Conway's action was brought against the "Madonna," "the property of the plaintiffs," and also that the plaintiff is bound to pay the judgment.

I think these are sufficient.

LOVIE vs. JOHNSON.

Sixth District Court for Sacramento Co., November, 1857.

LOST NOTE—COMPLAINT—NEGOTIABILITY.

In an action at law upon a lost negotiable note, the complaint must aver the loss of the note and the tender of an indemnity to the defendant.

When in such an action a plaintiff omits to make a tender of indemnity and to allege the same in his complaint, he cannot afterwards make the tender and then amend by inserting this averment, the avowed object being to prevent the operation of the statute of limitations.

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The defendant in an action on a lost instrument must show that it was negotiable.

Action against the joint makers of a lost note. The facts are fully referred to in the opinion. On motion for a new trial.

Upton & Hereford, for plaintiff.

• *Cartter, Hartley & Long*, for defendant.

BORRS, J.—This case stands on a motion for a new trial, founded upon the alleged errors of the court. The complaint charges the defendants as joint makers of two promissory notes. The defendant, Williams, answers, denying the making the note, admitting the endorsement, pleading want of notice of protest, extension of time given to the maker, and the statute of limitations. There is in the complaint no allegation of loss, or an offer of indemnity, or even of a readiness and willingness to indemnify. It appears, from the statement, that upon the trial, the plaintiff tendered a bond of indemnity, and then offered to prove the loss and contents of the note, but admitted that he was not prepared to show that the note was unendorsed. To this testimony, the defendant objected, and the sustaining the objection is now alleged as one of the errors of the court. The plaintiff then asked leave to amend by inserting an allegation of the loss, and of a tender of the indemnity, and the overruling this motion is alleged as another error.

I have no doubt that if a suit upon a lost negotiable instrument can be maintained at all in a court of law—and I admit that the supreme court have inferentially sanctioned the practice—it must be upon an allegation of loss, and of tender of indemnity; indeed, they have so expressly decided, in *Welton vs. Adams*, 4 *Cal.*, 37. Under the old form of pleading, a declaration upon a note, bond or bill was incomplete, that did not make *profert* of the instrument upon which the suit was founded. Although, in our modern system, we have dispensed with the allegation of a readiness to produce and surrender the obligation, we have not waived the necessity of the production and surrender. With respect to securities that were not negotiable, courts of law always held a proof of loss as laying the foundation for the admission of testimony of its contents. But if the instrument, whose contents

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were sought to be proved by parol, were the foundation of the action, an allegation of the loss was necessary to the admission of the proof of the fact. Hence, we have a form in Chitty for a declaration on a lost bond. Such was the state of the common law; but with the growth of commerce arose a new kind of written obligation, unknown to the common law, denominated "commercial paper." Upon this paper, for commercial convenience, was impressed the new feature of negotiability; that is to say, unlike other obligations, it was agreed that it should pass from hand to hand unincumbered by any offsets in the hands of the original holder. Consequently, payment to the original holder could not be pleaded against the present holder. How, then, could a suit be brought upon a lost note, when the recovery could not be pleaded against another suit brought by a party who might have innocently taken it from the finder? For this state of things the law courts knew no remedy; but it was considered an appropriate sphere for the more comprehensive action of a court of equity. Accordingly, under the more plastic forms of this tribunal, a remedy was afforded the unfortunate loser of the negotiable instrument, on conditions; the prescribed conditions being, that he should render the defendant satisfactory indemnity against future liability. But even under the laxest rules of this lax system, it was necessary that the complainant should aver a willingness to afford an ample indemnity. When the common law courts, emulous as they always were of the grasping power of equity, began to assert a co-ordinate jurisdiction over lost negotiable paper, they were necessarily embarrassed by the rigidity of their own system, which forbade a conditional judgment. What was to be done in this dilemma? Why, it became necessary to aver not only a readiness to indemnify, but an actual tender of indemnity, the sufficiency of which might be traversed; and, like every other tender, it must be brought into court, where it remained on deposit for the benefit of the defendant. If the common law courts will ape equity in such a case as this, it is only by this contrivance that its clumsy machinery can be assimilated to the plastic hand of a court of chancery. Hence it is, that our supreme court says, that a tender of indemnity is necessary to sustain an action at law upon a lost negotiable instrument. Nothing is clearer than that the plaintiff's complaint is wanting in the most essential averments, if he intended to declare upon a lost negotiable instrument.

But he claims the right to amend. Now, I confess that the spirit of

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the statute is so liberal in this respect as almost to offer a premium to the negligence of counsel; and in conformity with that spirit, I have never permitted the neglect to state a fact to obstruct the course of justice. But here I am asked to keep the action alive for the purpose of introducing into it the fact of tender of indemnity which did not exist at the time of filing the complaint, the avowed object being to prevent the operation of the statute of limitations, as far, at least, as one of the notes is concerned. In other words, I am asked to collude with the plaintiff to enable him to elude the law of the land. I shall do no such thing; if by his *laches* he has permitted his remedy to lapse for want of a tender of indemnity, it is not in my power, however much I may sympathise with his misfortune, to assist him to a tender *nunc pro tunc*.

So far, the case is plain enough. But the plaintiff now contends that it has nowhere appeared that the promissory note sued on was negotiable. As my memory serves me, the court asked if the note was negotiable, and the plaintiff's counsel admitted it was; but counsel now urge that the admission was inadvertantly made, and that there is really no evidence of this fact. I confess that reasoning *a priori*, I should have inclined to the opinion that he who sues avowedly upon a lost promissory note, that may or may not be negotiable, should be held to prove affirmatively that the note was not negotiable, or that, being negotiable, it was unendorsed, or in such other condition that the recovery sought would be a bar to further action; inasmuch as it is upon this state of things that his right of action may perchance depend. Moreover, it would seem that the alleged holder and owner of the note should be presumed to know the character of the instrument upon which he sues. But such is not the opinion of those who have gone before me. It has been held that upon him who resists the introduction of secondary evidence devolves the burden of showing that the lost note was negotiable. See 10 *Johns. Rep.*, 104; 3 *Wend.*, 344; 12 *Wend.*, 174. Now, if the note were not negotiable, there would be no necessity for the tender of indemnity, and I would not hesitate to permit an amendment, for the purpose of including an allegation of the loss. I shall, therefore, grant a new trial, for the purpose of allowing the introduction of an allegation of the loss, that the plaintiff may stand or fall upon the negotiability of the instrument.

Let an order be entered, granting a new trial.

Smith vs. Mayor, &c., of Sacramento City.

SMITH vs. MAYOR, &c., OF SACRAMENTO CITY.*

Sixth District Court, for Sacramento Co., November, 1857.

INJUNCTION—COURTS OF EQUITY—EMPLOYMENT OF COUNSEL ABROAD
BY A MUNICIPALITY.

Courts of equity will restrain certain acts of a municipal government by injunction.

An individual tax payer can complain separately of an injury common to him and all the other tax payers living under one municipal government, and by which he sustains no special injury.

The legislature cannot confer upon a municipal government other legislative powers than those which are *essential* to the due attainment of the local ends for which it is instituted.

The funds collected by municipal taxation can only be applied to municipal purposes.

The representatives of municipal corporations, as trustees of the corporation property, whether acquired by taxation or otherwise, come peculiarly within the province of a court of equity.

The facts are reported in the opinion. On motion to dissolve an injunction.

Clark & Gass, Sunderland, and Long & Morrison, for plaintiff.

G. C. Moore, city attorney.

BOTTS, J.—In May last the plaintiff filed his bill on the equity side of this court, describing himself as a tax-payer, of the city of Sacramento, alleging that the mayor and common council of said city had by ordinance, appropriated the sum of \$5,000 of the funds of the city, raised by taxation and licenses, to the employment of the legal services of one Alpheus Felch, to assist the attorney general of the United States in opposing the confirmation of the grant to John A. Sutter, now pending in the Supreme Court of the United States; alleging also that the said mayor and common council have transferred the said sum of \$5,000 from the debt and interest fund to the contingent fund, with a view to drawing a warrant in favor of said Felch, upon said contingent fund; praying that the mayor be restrained from drawing such warrant, and the treasurer from paying it, if drawn; and “that the mayor and common council be restrained and enjoined from taking the money belonging to the said debt and interest fund, and paying it to the contingent fund for the payment of such warrant, and that

* See ante p. 70.

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the moneys belonging to said debt and interest fund; may be required to be appropriated to the purposes for which they were collected."

Upon this application an order was made upon the defendants to show cause why the prayer of the complaint should not be granted, with the usual restraining order until hearing. On the 18th of May an order was made, purporting to be upon submission of the case, perpetually enjoining the defendants "ever after from using or appropriating the money in or belonging to the debt and interest fund and sinking funds, for any purpose whatever, other than such for which they were created." The defendants were further restrained from drawing or paying any warrant to Alpheus Felch until the further order of this court.

At the same time that the foregoing orders were made by my learned and respected predecessor, he filed that which, in form and style, might be called an opinion* in the case, in which he upholds the right of the common council to make the appropriation to Felch, but totally denies the right to transfer the moneys from one fund to another; and declares that, when it is satisfactorily proved to him, that the funds so diverted have been restored to their proper account, he will "dissolve the injunction so far as to permit the mayor to draw his warrant in favor of Alpheus Felch, for the sum of \$5,000, upon the general fund."

The defendants come now and proffer evidence of the restoration of the disturbed funds to their original position, and ask for a dissolution of the injunction.

The first point made by the defendants' counsel is, that the case has been virtually decided, and that nothing remains for the court, except to pass upon the testimony offered. I think otherwise; the restraining order which it is proposed to dissolve, is continued, until further order of the court. If the order had run that the restraining order should continue until the happening of a certain event, even if that event had been the production of testimony that another order of the court had been complied with, there might have been some warrant for the defendants' position. But there is a vast distinction between the order supposed, and the one really made. As to the intention expressed in the opinion, it is gratuitous, informal, and not intended, I apprehend, to bind the court. An opinion is supposed to furnish the

* See ante p. 70.

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reasons for the conclusion at which the court has arrived, but it is the judgment or order that must decide the question of *res adjudicata*.

In this view of the case nothing has been decided, but that the order restraining the defendants from intermingling the funds, should be made perpetual: and the defendants now asking me to dissolve the injunction, upon them lies the *onus* of satisfying me of the propriety of the order for which they ask.

This point being determined, the defendants say, this is not a proper case for the interposition of a court of chancery; and to this point they cite the opinion of chancellor Kent, in *Movers vs. Smedley* (6 *Johns. Ch. R.*) The case is directly in point, and the great jurist whose opinion is referred to, declares, unequivocally, that the supervision and control of the acts of public officers belong to the common law, and not to the equity courts. Those who remember the celebrated struggle between Ellesmere and Coke, need not be reminded of the rivalry between the law and equity courts of Great Britain; this spirit extended, in a measure, under the old system, to their representatives in America; but now, that the two systems are united in one tribunal, it cannot be a matter of much importance whether the proceedings of the city council are brought by *certiorari* before the law face of the court to be arrested by prohibition, or before the equity front of this Janus-faced tribunal, to be stayed by injunction. Indeed, our own Supreme Court, in the late case of *People vs. Supervisors of El Dorado co.*, (7 *Cal.*, July T.) seem to have been impressed with the view that there was no material difference between the two remedies. In that case the petitioner asked for a writ of prohibition, or of injunction, for the purpose of restraining the action of the board in regard to the allowance of the account. The court overruled the decision in *People vs. Hester*, (6 *Cal. Jan. T.*) where they held that a *certiorari* would not lie to the board of supervisors, saying, they suppose it was this erroneous decision that misled the court below in refusing the prohibition; but they add, "it is not perceived on what ground the court below refused to interpose by injunction." This subject, it appears to me, is very ably handled by Mr. Justice Strong, in the case of *Milhan vs. Sharp*, decided at the New York general term of the Supreme Court, April, 1853, and reported in 15 *Barb.* 193. He holds that the representatives of municipal corporations exercise two distinct functions.

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In their legislative capacity, they pass laws for the government of the city, and in the discharge of this duty they are beyond the control of the courts, either of law or equity ; but with respect to the property of the corporation—and this is applicable to property acquired by taxation or otherwise—they are trustees, pledged to administer it according to the requirements of the charter ; and as trustees they come peculiarly within the province of a court of equity. Perhaps a more difficult question still remains. Can an individual tax-payer complain separately of an injury common to him and all the other tax-payers of the city, and by which he sustains no special injury ? The right has been sustained in New York, both in *Christopher vs. city of New York*, 13 Barb. 567, and the case above cited of *Milhan vs. Sharp*. The doctrine is a convenient one, although it is opposed to the current of English authorities, and the analogy of the doctrine of public nuisances. It is easier to perceive the interest the defendant, as a tax-payer, has in preventing a waste of the corporate property, than how he is authorised to protect the creditors of the city, by requiring the separate funds to be kept intact.

Having thus gnawed our way through the bark, we have arrived at the pith of this case. Does the charter of the city confer upon the common council the power to make this appropriation to Alpheus Felch for legal services, to be rendered in contesting the validity of the Sutter title ? The defendants, when it comes to this, admit the council are a body of limited powers, and that it devolves upon them to show, affirmatively, that they possess the power they have attempted to exercise. To sustain this claim, the city attorney points us to the opening paragraph of the 7th section of the city charter. The 7th section purports to define the powers of the city council. It begins thus: "The said city council shall have power to make by-laws and ordinances not repugnant to the Constitution and laws of the United States, or of this State ;" and this, he argues, would be of itself sufficient to cover the power claimed. Indeed, it would. If this clause stood alone it would be sufficient to cover, not only this power, but to include all others, and to convert the city council into a body of general, instead of limited jurisdiction. But it does not stand alone ; it is only a part of a sentence, separated from the remainder by a semicolon. To make by-laws and ordinances not repugnant to the Constitution and the laws of this State and the United States, in and about what subjects ? This section goes on to enume-

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rate: "To prevent and remove nuisances; to fix and collect licenses, taxes," etc., etc., with a long and specific enumeration of the powers of the common council, in which I cannot find a single word touching the employment of Alpheus Felch or anybody else, to attend to suits in the Supreme Court of the United States. It is true that this paragraph winds up with these general words: "And to pass such other by-laws and ordinances for the regulation and police of said city, as they may deem necessary." Upon this clause, it is to be remarked, first, that all such general expressions are to be taken in connection with, and in subordination to, the specific enumeration of powers preceding it; and, secondly, that it is difficult to perceive how this Felch appropriation is in any manner connected with the "regulations and police" of the city.

The general rule is, that a delegated power cannot be delegated; and the doctrine of representative governments is, that the people are the general source of all power, and that the legislature possess but a delegated authority. It has been universally held therefore, that they could not confer the powers of government upon others. To this general and invaluable rule, cities, counties, and other *quasi* corporations, form the exception. Diversified as are the interests of these local communities, over and above the general government, they need a special government for local and municipal purposes. For instance, men in a crowded city must be subjected to restrictions that, if applied to a denizen of the country, would be intolerable, because unnecessary. Hence, there must be a local law of nuisances different from the general law; streets are to be regulated by other rules than those that suffice for ordinary highways. Special legislation involves the necessity of special taxation, and whatever may have been the origin of municipal corporations, their present character is undoubtedly determined by the considerations to which we have alluded. Resting, then, on necessity, and forming, as they do, an exception to the general rule, that the legislature cannot delegate the powers of government, it follows that the legislature itself can confer upon these municipalities only those powers that the nature of the institution, and absolute necessity demand. So it was held, in the case of *Lowe vs. The city of Marysville*, 5 Cal. 214, that any act of the legislature that would confer upon a municipal corporation any other than governmental or police powers, would be unconstitutional. If it were otherwise, if the

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legislature could confer general powers of government upon these sub-agents, directing, as they undoubtedly may, the manner of their selection, we might soon, in spite of our popular Constitution, possess a representative government only in name.

If the power of taxation, then, is authorised only so far as may be necessary for municipal purposes, it follows that the funds collected by taxation can only be applied to municipal purposes. It is true, it may sometimes be difficult to draw the line, and determine whether a particular thing comes within the term "municipal," but that there are other things, and I think this proposed employment of Mr. Felch is one of them, of which it may unhesitatingly be pronounced, that they are not necessary for "police or governmental purposes."

The powers of the city council are enumerated in the 7th section of the charter, and it will be seen, at a glance, that they appertain exclusively to what may be called police regulations. As to the subject of legal services, it did not escape the attention of the legislature; they provide that all suits, matters and things of a legal nature, in which the city may be interested, shall be committed to the charge of an attorney, *to be elected by the qualified electors of the city*. But, it is said, it could not be intended that the city attorney should attend the Supreme Court of the United States, and that this is a case of legal interest overlooked by the framers of the city charter. If by this is intended that the legislature have wholly failed to empower the city government to employ counsel in the Supreme Court of the United States, the proposition meets my hearty approbation.

If this appropriation be not a diversion of the city funds from the purposes to which they are legally devoted, I know no limits to the power of the common council of the city of Sacramento; at least so far as the important subjects of taxation and appropriation are concerned.

Let the order enjoining the mayor of the city of Sacramento from drawing, and the treasurer of the said city from paying any warrant, if drawn, in favor of Alpheus Felch, or any other person for his use, in pursuance of an ordinance passed by the common council of the city of Sacramento on the — day of —, appropriating the sum of five thousand dollars to said Felch for legal services in contesting Sutter claims within said city, be made perpetual.

Amos vs. Griffin.

AMOS vs. GRIFFIN.

Twelfth District Court for San Francisco Co., October, 1857.

COMMON PROPERTY (DIVISION OF)—DIVORCE. -

Property acquired by a woman, by purchase during coverture, is held in common, and subject to her husband's right of disposition.

Where property is conveyed to a wife by bill of sale, although purchased by her husband, the instrument must govern, and will not permit the presumption that the husband intended it as a gift to her.

Where parties are divorced, and no division of the common property is demanded, or made, whether the wife has a lien upon it for her moiety—*quære?*

This case was tried by the court, sitting as a jury. The facts proven on the trial were, that W. C. Amos was married to plaintiff in September, 1853, previous to which time the former had transferred to defendant, his interest in the pilot boats "Jenny" and "Relief." After the marriage, in November, of the same year, Griffin reconveyed this property to Amos *and wife*, who held it until September 17th, 1855, when the former again transferred it, by bills of sale, to one Reddish, who, in the following November, conveyed it, in the same manner, to *plaintiff*, by name; Griffin, who was the agent of the owners of the boats, paid to Amos the portion of the earnings thereof to which his interest entitled him, not only before, but while it was held by Reddish, and after he had conveyed to plaintiff, as long as Amos continued to be a pilot, but upon the suspension of the latter from that position, the earnings were paid to plaintiff until June last, when Griffin was informed by Culver & Armstrong, lawyers, that they claimed the interest, since which time he has retained the earnings to be disposed of, according to the final adjudications upon the rights in the premises, of plaintiff and Culver & Armstrong. In December, 1856, these latter obtained a judgment by confession, in the justice's court of the second district, of this city, against Amos, upon which they issued execution, and sold the interest of the latter in the two boats, at constable's sale, when they bought in the same for \$25, and subsequently, on the 10th of August, 1857, received a bill of sale thereof from the constable, as also one from Amos.

Amos and wife were divorced by a decree of this court in January, 1857.

It was further proven that the interest in question is worth about \$1000.

J. B. Hart, for plaintiff.

Brodie and G. F. & W. H. Sharp, for defendants.

Hart, for plaintiff, argued:

That the property in controversy, standing in plaintiff's name, she is the legal owner of it. Titles to vessels are regulated like titles to land, joint owners are tenants in common, and defendants having recognized plaintiff as standing in that relation to them, cannot dispute her title, nor can they bring in an outstanding title, and use it to her prejudice; the purchase enures to the common benefit. *Field vs. Pilot*, 1 *McMullan*, (S. C.) 370. The principle rests on the privity between the parties, and the good faith which the connection implies. *Van Horn vs. Fonda*, 5 *John's Ch.*, 407. In an action of ejectment the tenant is only liable for the rents paid the lessor, *after the service of the writ*. The notice given defendant, by *Culver & Armstrong*, is not sufficient to have rendered him liable to them for the earnings of the boats, if he had paid them to plaintiff. They should be driven to their action before she should be disturbed in her possession by her co-tenants. *Sedgwick on Measure of Damages*, 119-20.

The next question is, did the assignment, by bills of sale, to plaintiff, give to her title to the property, and is it subject to the debts of the husband? When the husband shall take, in the name of his wife, property or securities, the presumption is that it is a gift. 2 *Fonb. Eq. B. Ch.*, 5 and 3; *Back vs. Andrew*, 2 *Vern.*, 120; *Cook vs. Hutchinson*, 1 *Kern.*, 42, 50. Although the property was subject to the debts of the husband, because it was once common property, or the individual property of W. C. Amos, it is not subject to a debt made long after it had passed to plaintiff. *Creed vs. Lancaster Bank*, 1 *Ohio*; and see more fully to these points, *ante* p. 328

Brodie, contra, argued:

First.—The property in controversy is shown, by the language of the conveyance, to have been common property, having been acquired by purchase during coverture. 2 *Story's Eq. Jur.*, § 1383. The

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time when the property was acquired by purchase fixes its *character*, and parol evidence, on the part of the grantee, to change that character, is inadmissible. Davidson vs. Stuart, 10 *Louis.*, 146 ; Brown vs. Cobb, *ib.*, 174, 181.

Second.—Mrs. Amos was not a purchaser for a valuable consideration ; so that as to a subsequent purchaser, the conveyance to her was invalid. Wadsworth vs. Havens, 3 *Wend.*, 411.

Third.—The doctrine of *estoppel* does not apply. Defendants do not deny the existence of the tenancy in common at one time, but say that the interest has subsequently passed to Culver, under the constable's sale, and the subsequent conveyance by Amos. This averment is entirely consistent with the tenancy in common. Hopcroft vs. Keys, 9 *Bingham*, 613.

Fourth.—The fact that defendants have paid the earnings to Mrs. Amos, does not *estop* them from setting up Culver's title, and showing that he had prohibited payment to plaintiff. Doe *ex. dem.* Higginbotham vs. Barton, 11 *Adol. & El.*, 307 ; Doe *ex. dem.* Plevin vs. Brown, 7 *Adol. & El.*, 447.

NORTON, J.—The principal question raised in this case is the same as that settled in Meyer vs. Kinzer,* decided this term, viz., the tenure under our law, by which the husband and wife hold property conveyed to them, or her, during coverture. The principal difference between the circumstances of the two cases, affecting this question is, that in that instance the chattel interest, a note and mortgage, was made and delivered to the husband and wife *jointly*, while in the present, the property was conveyed directly to the wife *alone*. Counsel for plaintiff contend that the circumstance of the interest in controversy having been conveyed to the wife alone, and in her own name, raises a presumption that the husband intended it as a gift, or advancement to her, and is sufficient to sustain the claim which she now asserts to it, as her undivided property. This presumption, however, cannot be entertained, for the instrument through which she necessarily claims, if she claim at all, must be held conclusive ; and it shows that the transaction by which the transfer to her was made, by Reddish, in November,

* See *ante*, p. 325.

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1855, was a *sale*; therefore, the manner by which the title to this property was acquired, comes within the strictest interpretation of the words of our statute, defining the channels through which, if the title to property be derived, it shall be deemed to be held in common. This was a *purchase* by the wife. Being, then, common property, it was subject to Amos' right of disposition, and he having disposed of it, the plaintiff can now claim no title thereto.

It further appears, however, that this interest was common property at the time of the divorce of the plaintiff from her husband, which took place in January, 1857, while the deed from Amos to Culver & Armstrong bore date August 10th, of the same year. This being the case, it should have been divided under order of the court, at the time of granting the decree of divorce. The statute (*Wood's Cal. Dig.* p. 488 § 2615) regulating these proceedings, provides that the court shall make a division of the property held in common between the parties, at the time, etc.; but in this case no division has in fact been made, and it would seem that it remains subject to the husband's disposition. Certainly it has not become her individual property. Perhaps she has a lien on the property for her moiety thereof, and the proportionate amount of the profits, by virtue of the above provision of the statute. But under the present aspect of the case she is not entitled to recover.

Let judgment be entered accordingly.

HUNTER vs. WATSON.

Sixth District Court for Sacramento Co., November, 1857.

EJECTMENT—POSSESSION—NOTICE.

A creditor taking real estate in satisfaction of a preëxisting debt, holds it free of all equities of which he had not notice.

Possession is equivalent to notice of an equity in the occupant, arising from an acquiescence by the grantor of the purchaser in the sale by another to the occupant, though not of an equity arising from an unrecorded deed to him from the purchaser's grantor.

The facts are fully reported in the opinion.

Hunter vs. Watson.

Moore & Welty, for plaintiffs.

Crocker, McKune & Robinson, for defendants.

BOTTS, J.—This is an action of ejectment. A jury having been waived, it devolves upon the court to find the facts, and apply the law. The plaintiff obtained a judgment in this court, upon the 11th day of October, 1855, against one Glen, for the sum of \$750 ; issued execution, which was levied upon the premises described in the complaint, upon the 27th day of June, 1856 ; on the 24th day of July, 1856, the property was sold by the sheriff, under said levy, and purchased by the plaintiff, for the sum of \$600. The receipt of the purchase money was endorsed on the execution, and signed by the plaintiff. On the 29th day of January, 1857, no offer having been made to redeem, the sheriff conveyed the property to the plaintiff.

The defendants are in possession, and claim, as the lessees of one Hubbard, the administrator of Knox. One McPherson was the owner of this property on the 25th day of January, 1851 ; being indebted to one Forbes, and Forbes being desirous of concealing his property from his creditors, McPherson conveyed to Glen, with a secret trust for Forbes. Glen sold the property to Knox, for a valuable consideration, which was paid to Forbes. Glen's conveyance to Knox is dated the 20th day of September, 1851. Knox had no knowledge of the fraudulent object of the conveyance to Glen. Knox failed to record his conveyance. Knox died on the — day of —, 1854. On the — day of —, Glen executed a conveyance of the premises to Knox and his heirs, which was recorded on the 27th day of March, 1856. Knox's administrator was in the notorious possession of the property at the time of the plaintiff's purchase. The defendants hold under a lease from Knox's administrator. The monthly value of the premises, since the 27th of January, 1857, has been fifty dollars.

Upon this state of facts, this question is presented : Is the plaintiff, a subsequent *bona fide* purchaser, entitled under the statute to priority over Knox's unrecorded deed ? First, it is contended that obtaining the property, as he did, in discharge of a preëxisting debt, he is, in fact, no subsequent purchaser at all ; and this seems to have been the view taken in some of the earlier decisions. They were founded upon

the supposition, that by such a purchase, the creditor gave nothing surrendered nothing, and was merely subrogated to the position of the judgment debtor, and, consequently, took the estate subject to all the equities with which it might be encumbered in the hands of the debtor. So it was held, that a negotiable note, taken in payment of a preëxisting debt, carried all its equities along with it. See *Dickerson vs. Tillinghast*, 5 *Paige* 221. In truth, the two cases rest on the same basis, and must stand or fall together. But it is apparent that the creditor, who takes either an estate secretly encumbered, or a negotiable note with offsets attached, is deluded into the surrender, at least, of his right of action on the original debt, and may be lulled into a fatal security. Hence it is, that our supreme court, in accordance with the later and better authority, have held, in the late case of *Payne vs. Bensley*, that the holder of a negotiable note, taken as collateral security for a preëxisting debt, holds it free of equities; and in the same spirit, I believe they will hold, as I do, that the plaintiff took this property free from any equity of Knox's representatives of which he had no notice.

But it is said that Knox's representative was in the notorious possession of the property at the time of Hunter's purchase, and that, in law, notorious possession is notice of the equitable title of the occupant. I must confess that, upon this subject, the supreme court have been backing and filling, until it is difficult to ascertain their present latitude and longitude. But we must do our best to work up the reckoning.

In *Call vs. Hastings*, 3 *Cal.* 179, the court said the registry act was only intended to protect subsequent purchasers, without notice, either actual or *constructive*. In *Mesick vs. Sunderland*, they declared that the registry act had abrogated all constructive notice, except that arising from registry. On the argument of *Bird vs. Denison*, a majority of the court avowed themselves fixed in the doctrine of *Mesick vs. Sunderland*. In *Lick vs. Stafford* they said that possession, though not of itself sufficient to prove notice, might be given in evidence, as tending to prove it; as if, under our constitution, the court could instruct upon the weight of testimony, after it is admitted. Then, in *Ellis vs. Janes*, they held that possession was notice of the equity arising from a contract of purchase, but not of the equity arising from the possession of an unrecorded deed. At last, in *Bryan vs. Ramirez*, they unequivocally declare, that possession is equivalent to

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notice of an equity arising from an acquiescence in the purchase from another. But the plaintiff contends that, although the court has receded from the broad ground assumed in *Mesick vs. Sunderland* they have never retreated farther than the doctrine in *Ellis vs. James*, where they drew the distinction between the holder of an equity and the grantee of an unrecorded deed. In this position, it would seem that he is correct ; although I must frankly confess that I do not perceive the ground upon which the distinction rests. Possession never had, logically, any tendency to establish the fact of the existence of an equitable title in the occupant ; much less did the mere fact of occupancy establish the inference, in a reasonable mind, that all the world must know the title of the occupant. No such absurdity ever found a lodgment in the minds of the sages of the law. But it was an arbitrary, despotic rule, adopted from motives of supposed policy. It was urged, that the rule would afford great protection to latent equities, and would work no injury to the innocent purchaser of the legal title ; because, in the face of the rule, he would always enquire of the occupant concerning his equities before he purchased. After the adoption of the rule, it was held that the purchaser either had enquired and been informed, or that he must suffer from his own neglect. When the registry system first came in vogue, the provision was, that the unrecorded deed should be absolutely void, except as between grantor and grantee. But even here, courts of equity held that if a subsequent purchaser knew that the property had been bought and paid for by another, his own purchase would be fraudulent and void. See 1 *Burrows*, 474 ; 2 *Mass.*, 508 ; 3 *Mass.*, 574 ; and the opinion of chancellor Walworth, *Dickinson vs. Tillinghast*, 5 *Paige*, 221. After this doctrine had been thoroughly settled by the courts, it came to be recognised by the adoption, into the registry statutes, of the words "*bona fide*" purchaser ; the unrecorded prior deed should be void as against subsequent *bona fide* purchasers, *only*. It was plain enough to see at whom the statute squinted as *mala fide* purchasers : all those who were infected with notice. And here it was universally held, that possession should be, as of old, notice of the relation the occupant held to the property. See the Massachusetts authorities before cited ; 11 *Wend.*, 442 ; 8 *Wend.*, 620 ; 6 *Wend.*, 213 ; 9 *Cowen*, 120 ; 7 *Watts*, 625 ; 4 *Dana*, 258, etc. I cannot perceive anything in the

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nature of occupancy, that authorises the presumption, that a purchaser knows that his grantor stood by, and permitted the occupant to buy of another, and yet does not apprise him that the occupant holds an unrecorded deed from his grantor. But I suppose it is my duty to look through the glasses of the supreme court, even if I see through them darkly.

The plaintiff is to have judgment for the possession of the premises described in the complaint, for damages, and his costs of suit. Let judgment be entered accordingly.

CLAVEAU vs. MANN.

Fourth District Court for San Francisco Co., December, 1857.

CHANGE OF VENUE.

A change of *venue* will not be granted on the ground of convenience of witnesses of one party, when it will work equal inconvenience to the witnesses of the other party.

Motion to change place of trial to Mariposa county. The facts are sufficiently given in the opinion.

T. C. Hambly, for plaintiffs.

J. H. Wade, for defendant.

HAGER, J.—This action is brought to recover the value (\$3,515) of services, etc., in painting a panorama of the Yo-Semite Falls. Defendants move to change the place of trial to the county of Mariposa, and in support of the motion have filed affidavits to the effect that the work was performed, and their witnesses reside in that county. Plaintiff, in opposition to the motion, shows by affidavit that the contract sued upon was made in this county; that three of defendant's witnesses, and that the principal and most material witnesses of plaintiff, reside in this county. Under the circumstances, I cannot conclude that the convenience of witnesses or the ends of justice would be promoted by a change of the place of trial. To grant the motion might be an

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accommodation to defendants, but it would be putting plaintiff to great inconvenience. The plaintiff resides here, and in this action it was his privilege to sue in this county. Upon the showing made, it is my opinion the place of trial should not be changed. Motion denied.

WELCH vs. SULLIVAN.

Fourth District Court for San Francisco Co., December, 1857.

JUDGMENT ON REMITTITUR.

The clerk of the court should enter the judgment upon the *remittitur* of the supreme court when it specifically directs the particular judgment to be entered ; but if the supreme court require a modified judgment to be entered according to the opinion delivered, application should be made to the lower court to order such judgment.

Motion to set aside a judgment on *remittitur* entered by the clerk. The material facts are set forth in the opinion.

N. Bennett and E. Cook, for plaintiff.

Saunders & Hepburn, for defendant.

HAGER, J.—In this action the *remittitur* of the supreme court, with the opinion of the judges, has been filed, directing the judgment of this court should be modified in accordance with the opinion, with costs for the appellants. It appears that the plaintiff has proceeded to have a modified judgment entered in the clerk's office, without notice to the defendant, or application to this court. The question involved is this : Is the entry of the modified judgment a ministerial act to be performed by the clerk, under §358 of the Practice Act, or a judicial act, to be first ordered by the court ? The proper practice, according to my opinion, in entering judgment upon the *remittitur* of the supreme court, is for the clerk to do it when the supreme court specifically direct the particular judgment to be entered ; but, if the court indicate the error, and require the judgment to be modified according to the opinion forwarded with the *remittitur*, the entry of the modified judgment is a judicial act, and application should be made to the court. The entry of the modified judgment was irregular, and must be set aside.

ADAMS vs. HASKELL.

Fourth District Court for San Francisco Co., December, 1857.

RECEIVERS—ACCOUNTS, POWERS, AND LIABILITIES OF.

Receivers' accounts should show the amount of property and funds received, as well as disbursements made; and when presented should be verified under oath, as should also the accounts of assignees appointed under the insolvent law of this State.

If a receiver has made a disbursement without the order of the court, the *onus* is upon him to prove that it was necessary, or resulted beneficially to the estate, before it will be allowed.

If a receiver prosecutes suits for debts without an order of court, and fails to recover, as a general rule he will not be allowed his costs and expenditures out of the fund in court.

A receiver should not employ as his counsel the attorney of either of the parties to the suit.

On report of *G. A. Grant, Esq.*, in the matter of the petition and claim of *Cohen, Roman & Jones*, assignees appointed in insolvency, of the assets of *Adams & Co.* for services and disbursements.

Shafters, Park & Heydenfeldt, for plaintiff.

S. H. Dwinelle, for defendants.

Hoge & Wilson, for *Cohen, Roman & Jones*.

HAGER, J.—At or about the time this action was instituted, one of the petitioners, *A. A. Cohen*, was appointed the receiver therein, and entered upon the performance of the duties of his office. Subsequently *Woods*, on behalf of himself and his co-partners, *Adams & Haskell*, filed in this court a petition in insolvency, and the petitioners herein, said *Cohen, Roman & Jones*, were appointed assignees, and as such succeeded *Cohen* the receiver. Both appointments were made in and under the authority of this court: afterwards, the supreme court held that this court had no jurisdiction in the matter of the proceedings in insolvency, inasmuch as it appeared by the insolvents' petition, that a portion of the indebtedness sought to be discharged, had been incurred as bankers. (*Cohen vs. Barrett*, 5 Cal., 195.) The proceedings in insolvency were consequently void *ab initio*.

Cohen having been regularly appointed receiver, continued as such notwithstanding the proceedings in insolvency, until his removal from

office. *Roman & Jones*, inasmuch as they entered upon the performance of the duties under the authority of the court, received the funds in the custody of the court, must, in conjunction with *Cohen*, be regarded as *quasi* receivers, until the decision of the supreme court, July term, 1855, to which I have just referred. It then follows that *Cohen* as receiver, and *Roman & Jones* as *quasi* receivers, became custodians of the property, &c., in the custody of the law in this action, and are bound to account to this court, and are entitled to its protection so far as they have acted under its authority, or within the powers ordinarily exercised by receivers, or specially conferred upon them by order, or by operation of law. Their accounts either as assignees or receivers, containing a full account of receipts and disbursements, should be filed and passed upon in like manner as if their appointment had been regular.

Receivers' accounts should show the amount of funds and property received, as well as disbursements made, and when presented should be verified under oath. This is the chancery rule, and our insolvent law has the same provisions in regard to the accounts of assignees under that act. 3 *Dan. Ch. Pr.* 1996.

The accounts in this case as reported by the referee, contain no statement of funds, &c., that came to the hands of the petitioners, nor are they verified. It only contains items of disbursements and claims for services; these are all, with one or two exceptions, allowed as claimed, and amount to the sum of \$43,492.80; of this \$15,000 is for the services of the petitioners, \$5000 being allowed to each, and the balance for expenses and disbursements.

It has heretofore appeared in the proceedings in this action, that the petitioners after their appointment, with the consent of the court, took charge of the funds and property in its custody belonging to this suit, and after being adjudged guilty of contempt, delivered a portion of the same upon the order of the court, to the present receiver, *Naglee*. It also appears by this report that *Naglee* received from petitioners a certificate of deposit for \$100,000, as security for the payment of that sum. Have petitioners accounted for those funds? They went into their possession as *quasi* receivers, and they should account for them upon a settlement and discharge. If they have delivered them over to the new receiver, that fact should appear by the accounts and the

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report of the referee; but they contain no information on the subject.

The report of the referee allows to petitioners the sum of \$43,493.80, but is silent as to the amount of money received by them. The question then arises, how is the sum allowed to be paid? From out of the funds still remaining in court, or have petitioners appropriated for that purpose, a portion of the moneys that came into their possession? Have petitioners reserved this sum to cover their disbursements? These are questions that I am unable from anything that appears of record, to determine. It seems to me, however, that should I confirm this report, the amount allowed would necessarily become a charge upon the fund in court, and yet the court would be without information as to the true state of petitioners' accounts. I have heretofore announced that the charges as made or reported upon, against the fund, exceed the amount in court, and until the sum on hand to be distributed is ascertained, a distribution cannot well be made. I heretofore set aside a portion of the fund, supposing that there was sufficient remaining to pay all claims against it, and ordered that it should be distributed among the creditors, which order was removed to the supreme court, and at the last July term reversed, all proceedings in this court in the mean time having been stayed by the order of that court.

The charges reported and those claimed against the fund, may be stated as follows:

1. Report of <i>Mr. Cleary</i> on claim of <i>Mr. Stanley</i> , for fee, set aside but undisposed of,	\$20,000 00
2. Report of <i>Mr. Grant</i> in favor of <i>Cohen</i> , heretofore passed upon,	28,704 33
3. Report of <i>Mr. Grant</i> in favor of <i>Cohen, Roman & Jones</i> , now under consideration,	43,493 80
Total amount,	\$82,198 13

Now by account of receiver <i>Naglee</i> , and report thereon by <i>Mr. Yale</i> , the entire sum in court, after deducting the disbursements allowed the receiver, exclusive of allowance for his services, amounts to only,	58,385 50
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Showing a balance against the fund of	\$33,812 63
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The two reports of *Mr. Grant*, and those by *Messrs. Haight & Yale*, have come in recently, or within a few weeks past. They are long and voluminous, and I have disposed of them as soon as the other business of the court allowed me time to give them the consideration which their importance demanded. When I ascertain the amount of funds in court to be distributed, I am prepared to make a decree. In the meantime, if any party thinks the fund unsafe, I will make an order that it be specially deposited until it is required for distribution.

By his former report <i>Mr. Grant</i> allowed <i>Mr. Cohen</i> \$10,000 for services, and \$18,704.33 for expenses, &c.; by this one, he allows him \$5000 more for his services, and to <i>Roman</i> and <i>Jones</i> each \$5000, and for their expenses \$28,493.80, making altogether an allowance to the three for about five months' services, of	\$25,000 00
And for their expenses, &c.,	47,198 13

Showing a gross expenditure of	\$72,198 13
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The amount to be allowed for services not having been referred, it is not necessary to consider it, and it only remains to consider the disbursement and expense account. When I set aside the report in favor of *Mr. Stanley*, I referred to and announced some general principles of law by which this court would be governed in making allowances for the expenses, &c., of receivers. That matter having been carried to the supreme court and sustained, I have seen no reason to change the views then expressed. Receivers may at all times protect themselves by an order of the court, in making any expenditure. If they proceed without it, the *onus* is upon them to show that the expenditure was necessary or has resulted beneficially to the estate, before it should be allowed. If a receiver prosecutes suits for debts without an order from court, and fails to recover, he will not be allowed his costs and expenditures out of the funds in court. *Edwards on receivers*, pp. 4, 117, 159, 530. *Smith on receivers*, 166.

The referee has neglected to report the testimony as was required by the order of reference, and I have no legal evidence before me to determine the validity of the allowances made by the referee. By the minutes of the referee, it seems the items of disbursement were generally supported by the testimony of those who received the money, and it does not appear that the larger portion of those allowed were made

by order of court, or were necessary or beneficial to the estate. A great proportion appears to have been paid to various lawyers, among them the attorneys of the plaintiff and of the defendants in the action, for all of which I am unable to find any reason for charging them against or paying them out of the fund. Heretofore I held that a receiver should not employ as his counsel the attorney of either of the parties; this, for obvious reasons, is a salutary rule, and yet the petitioners employed the attorneys of plaintiff and defendants, as appears by the report, and paid them large fees. I think that about \$13,000 is claimed and allowed as paid to lawyers, yet it does not appear that any of the suits resulted favorably to the estate or what became of them.

It also appears that petitioners have charged and had allowed to them, for which I can find no sufficient authority, a large amount for clerks, porters, agents, &c. They had three regular clerks, one, *Mr. Robie*, at a monthly salary of \$400, and the others, *Messrs. F. A. Cohen* and *Bourne*, at \$250. To *Robie* alone appears to have been allowed for salary and expenses, \$2435, of which sum \$500 was for extra services while at the same time it seems he was an *employé* of the Pacific Express Company.

But I deem it unnecessary to review the report in detail. In form it is defective, and even should this be waived, its substance is such that I feel unwilling to give it my approval. Should I confirm and adopt it, it might entitle petitioners to a claim upon the fund in court, which would nearly absorb the balance as reported by *Mr. Yale*, without information being before the court of the amount of funds justly chargeable against petitioners, or any satisfactory evidence of the true amount petitioners are entitled to, for expenses and disbursements.

The report is set aside.

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ADAMS vs. HASKELL.

Fourth District Court for San Francisco Co., December, 1857.

ASSIGNMENT—ATTACHMENT—PARTNERSHIP—JURISDICTION—RECEIVER—COURT OF EQUITY—STIPULATION—DISTRIBUTION OF ASSETS.

In this state in an action in equity, the district courts have jurisdiction to dissolve partnerships, and may declare them void *ab initio*, if there has been fraud, imposition or misrepresentation in the original agreement.

Where a partner has a right to dissolve the partnership, it is a matter of course to appoint a manager or receiver of the property.

The order appointing a receiver followed up by giving the requisite security, is treated as an equitable sequestration of the property which vests in him as the officer of the court without an assignment from the owners.

The court will ultimately make such disposition of the property as will preserve the legal and equitable right of every claimant, it being the rule in equity that when the court gains jurisdiction for one purpose, it retains it generally, for relief.

The receiver is for the benefit of all parties who may establish rights in the action. The property is in *custodia legis* for whoever can make out a title to it. It is the court itself which has its custody and possession; the receiver, at common law, independent of any statute, is the creature of the court, and cannot be disturbed by a party or all the parties, without leave of the court. The court will protect the property in his possession from acts of violence or suits at law.

An equitable sequestration of property in an equity suit, is not an assignment within the meaning of our insolvent laws.

Assets belonging to an equity suit, in court, and reduced to the possession of the receiver, are not the subject of attachment in an action at law.

After a reference and notice for all creditors to prove claims, &c., the court will not allow the parties to stipulate away the rights of those who have intervened before the referee.

If no preferences or priorities of payment or liens are established, the assets will be distributed *pro rata* among all the creditors.

Shafters, Park & Heydenfeldt, for plaintiff.

Saunders & Hepburn, for receiver Naglee.

Hoge & Wilson, for receiver Cohen.

Stanly & Hayes, McDougal & Sharp, Mastick and others, for creditors intervening.

HAGER, J.—On the 23d day of Feb, 1855, plaintiff filed his original complaint in this action, asking among other things, for a dissolution of the

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partnership, and the taking of an account: also that defendants be restrained from carrying on or interfering with the partnership; that a receiver be appointed to take charge of all the real and personal property, etc., and the management of the partnership, and that the assets be applied to the payment of the said partnership debts. On the 25th of June, 1855, plaintiff filed an amended complaint, containing additional and stronger allegations, and with substantially the same prayer for relief.

On the day of filing the first complaint, Feb. 23d, my predecessor in office, judge *Lake*, upon the written consent of defendants, granted an injunction and appointed a receiver, (*A. A. Cohen*,) as prayed for, and on the same day the receiver filed his bond and entered upon the performance of the duties of his office.

Subsequently on the 27th day of February, 1855, defendant *Woods*, in behalf of himself and his copartners filed, in this court, a petition of insolvency, and in that proceeding, *A. A. Cohen*, the receiver, together with *Richard Roman* and *Edward Jones*, were appointed assignees, and entered upon the performance of their duties.

Cohen, as receiver, took the possession and control of the partnership property and affairs, until the appointment of *Roman* and *Jones*, when the three acted jointly in the same business, until the decision of the supreme court, of July term, 1855, was rendered, pronouncing the whole proceeding in insolvency, void. After this, *Cohen*, by virtue of his first appointment, continued to be the legal receiver, until, for cause, he was removed. Then *H. M. Naglee*, the present receiver was appointed, and an order of court and demand was made on *Cohen*, *Roman* and *Jones*, to deliver to him as receiver, the assets etc., in their possession, belonging to the estate. This was refused because, among other reasons, the assets were attached by some of the creditors of *Adams & Co.* *Cohen* and *Jones* were held guilty of a contempt of court and adjudged to be imprisoned until they complied with the order. These proceedings were then carried to the supreme court, when it was held, (the judges all concurring,) as follows that *Cohen*, *Roman* and *Jones*, "were merely custodians or receivers, by virtue of the order of court. They received it from the court because *its possession by the receiver was the possession of the court.* They received it by order of the court and could consequently only hold it subject

to the direction of the court; it is in their hands and is not their property; they are surely answerable to some one for it; it can only be in the power from whence they derived it, and *whose special property it was* when they obtained it."

"It was no answer to this, to say that the fund has been attached by the garnishment of the creditors of *Adams & Co.* It was not the subject of attachment. It was already in the hands of a receiver before any attachment issued. The receiver is the officer of the court, and the fund in his hands is in court—in the custody of the law, and can only be disposed of, by the order and direction of the court. Nor, (as was contended at the bar) is its disposition subject to be affected by any action of the immediate parties to the suit. The bill was filed for the purpose of seizing the assets of the partnership and having them distributed to the creditors. This purpose a court of chancery will carry out without regard to any attempt on the part of partners to evade or defeat it. It was the duty of the court as soon as this bill was filed, and the property was under its control, to require all the creditors of *Adams & Co.* to appear within a given time before a master to be appointed for the purpose, and have their claims audited under such rules and regulations as to notice, as would secure a fair hearing and a just account. Upon the report of the master and its confirmation *the fund would then be distributed pro rata* among the creditors *whose claims were allowed.*" See *Adams vs. Woods & Haskell*, 6 Cal. 113.

When the *remittitur* came down containing the unanimous opinion of the supreme court, as above given, I considered it tantamount to instructions to this court; and on the 14th day of February, 1856, made an order of reference with special instructions, to *Gilbert A. Grant, Esq.*, referee, to take account of the claims of all creditors of *Adams & Co.*, for the purpose of making a *pro rata* distribution, and to bar those who did not come in within the time limited. (See order and the minutes of February 14th and 22d, 1856.)

The time limited for proving claims was afterwards enlarged, and on the 26th day of November, 1856, the referee made and filed his report of claims proved before him, to the amount of over one and a half million of dollars. This report was afterwards confirmed, except

only, I believe, as to the claims purchased by and allowed to one of the attorneys of the plaintiff.

On the 14th of February, 1856, the default of the defendants was entered. (See minutes of the court, Dec. 27, 1856.)

The relief demanded in the complaint being for a dissolution of the partnership and a distribution of the assets among the creditors, after the default was entered, nothing remained to be done but the taking of an account of the claims of creditors, to enable the court to give judgment or to carry the judgment into effect, according to the provisions of our Practice Act § 150 2d; and, for this purpose, the reference, made as above stated, was proper and according to practice.

The entry of the default, under our system of practice, was equivalent to a decree, *pro confesso*, as against defendants, who were the only parties, besides the plaintiff, who had appeared or were before the court.

Following the report of Mr. *Grant*, and on the 30th of December, 1856, a dissolution was specially decreed, and an order was made to the effect that, of the funds in the hands of the receiver, there should be paid "two per cent. to the parties entitled thereto on claims allowed and reported by referee, *Gilbert A. Grant, Esq.*, as the first dividend out of the fund in court in this action." (See order and minutes of court, Dec. 30, 1856.)

On the 28th of April, 1856, *Thomas A. Lynch, Richard Savage*, and others applied to the court for leave to file an intervention in this action, when they were informed by the court that they had the right by statute if they could intervene at all; and the court then refused to stay proceedings in the suit, and ordered that the intervention should not be so construed as to extend the time of filing the claims of said intervenors before the referee, according to the order theretofore made. (Order and minutes, April 28, 1856.)

Under our statute a third party is entitled to intervene in an action before or after issue has been joined, either by joining the plaintiff, in claiming what is sought by the complaint, or by uniting with the defendant, in resisting the claims of plaintiff, or by demanding anything adversely to both the plaintiff and defendant. The intervention must be by petition or complaint, and be served on the parties to the action against whom anything is demanded, who must answer it as if it were

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an original complaint, and the court is to determine upon the intervention at the same time the action is decided.—(See *Wood's Cal. Dig.*, p. 176, art. 807.

At the time this intervention was filed, the defendants had been defaulted, and the order of reference to Mr. *Grant* to take an account of the claims of the creditors, had been made and was still pending.

The intervenors, among other things, allege the institution of this suit and the proceedings in insolvency—the appointment of *Cohen*, *Roman*, *Jones* and *Naglee*, receivers, respectively as above stated, that this suit was instituted by *Woods*, in confederation with *Cohen*, the receiver, and with divers other persons, with intent to hinder and delay the intervenors and other creditors in the collection of their just debts; that *Cohen* was appointed receiver by the judge of this court, with authority to take and receive the assets of said *Adams & Co.*, and that he did so, on or about the 23d day of February, 1855: that these assets next went by order of court to *Cohen*, *Roman* and *Jones*, and then to receiver *Naglee*: that the intervenors by attachments, issued out of the courts of the state and levied, have acquired liens upon those assets, etc.

Intervenors then pray for a stay of all proceedings in this action on the part of the parties thereto, except to determine the matter, alleged in the intervention: that it be declared to have been instituted with intent to hinder and delay the creditors of *Adams & Co.*, and that the action and all proceedings had therein, and all rights and claims by virtue thereof, be declared void and set aside, and that the said assets be made subject to the liens claimed by the intervenors, etc.

I can find no evidence of record of a service of this complaint of intervention upon any of the parties; but defendants *Haskell* and *Woods* made answer April 30, 1856, denying the allegations, charging fraud, collusion, confederation and designs to hinder or delay creditors, etc. There is also a stipulation signed by the attorneys of the plaintiff, defendants and intervenors, dated Aug. 15, 1857, filed Sept. 11, 1857, admitting that intervenors were attachment and judgment creditors of the firm of *Adams & Co.*, as in the complaint of intervention alleged.

On the 11th of September, 1857, *Thomas Holling*, *Rudolph Hurtel*, *Michael Shannon*, *Charles Wheelright*, *Edward Stanley*, *Joseph C. Palmer*, *John H. Dall*, *Merrick G. Reed*, *Aldrich Schaefer*, *John Van*

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Bergen, Owen S. Dorman, John Hahn, James Gallagher, Martin Burke, James S. Painter, George O. Whitney, Albert E. Field, and Abia A. Selover, filed a complaint of intervention, containing allegations substantially the same as those contained in that of *Savage, Lyneh*, and others. I can find no evidence of its having been served upon the parties to the original suit or the creditors brought in by the report of *Grant*, or of any answer, except that contained in a stipulation filed Sept. 11, 1857, signed by the respective attorneys of *Adams, Haskell* and *Woods*.

There also appears on the files of Sept. 11, 1857, an intervention merely setting up and claiming a lien by attachment on some of the assets of *Adams & Co.*, in behalf of *Alfred Wheelright*; no service or answer appears to have been made.

As far as I have been able to examine the mass of papers on file in this action, I can find no other interventions besides those enumerated.

On the same 11th of September, 1857, the complaints of intervention were referred to *F. M. Haight, Esq.*, to ascertain and report to this court the dates and amounts of any liens by attachments, judgments, or otherwise, claimed by the intervenors, with the testimony, etc., and on Sept. 23d following, this referee filed his report, and informs this court that it was made to appear before him "by the original writs of attachment and return, that *S. Batchelder*, on the 23d day of Feb., 1855, attached certain personal property, and all moneys, debts and effects, credits, or other personal property in the possession or under the control of *A. A. Cohen, receiver*, belonging to the defendants, *Adams & Co.*, and on the 23d day of June, 1855, made a similar attachment of all property in hands of *Edward Jones*, one of the assignees of *Adams & Co.*, and *I. C. Woods*, that said attachment was for the sum of \$2,000, and judgment was rendered in the superior court on the 17th day of July, 1855, for \$2,150 75 damages and costs."

The report then proceeds to give a statement of various attachments having been issued by the different intervenors, between Feb. 23, and June 23, 1855, and the assets in the hands of *Cohen*, and, *Cohen, Roman* or *Jones* having been attached, judgments obtained, etc., similar in purport to the above, and with his report, the referee returns the original papers and records as the evidence from which he

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has drawn the facts reported. (See report of *F. M. Haight Esq.*, on file, etc.)

This report was submitted to the court, and, on the 14th of November, 1857, it was confirmed "without prejudice to such further consideration as to its effect, that might be given it upon final decree." (See opinion and order in minutes, Nov. 14, 1857.)

This being an equity suit, and this report, as also the one made by Mr. *Grant*, auditing the claims of the creditors generally, being for the information of the court, preliminary to decree of distribution, properly come before the court at this time for consideration, and to aid the court in arriving at a conclusion upon the question of distribution.

By Mr. *Haight's* report, and the attachments, it does not appear that any property was taken into the possession of the officer under the attachment; nor is there a description of that attached in the hands of *Cohen*, *Roman* or *Jones*. The same remark will apply to the executions issued on the 9th of July, 1857, while *Naglee* was the receiver. Whether or no there was any property in their hands, cannot be ascertained by the report, or by the attachments, or any proceedings under them. It is only by evidence, *aliunde*, that this court has any knowledge or information in regard to those matters.

Having thus stated the history and proceedings of the action, so far as I deem it necessary to refer to them, (except the decision of the supreme court upon the intervention of *Lynch* and others, hereafter noticed,) I will now proceed to consider the important points that present themselves.

1st. Are the allegations of plaintiff's complaint sufficient to give this court jurisdiction of the action in equity.

In the original complaint, plaintiff alleges that an agreement for a special partnership between plaintiff and defendant was entered into in his name, by his agent, without power or authority, (he, plaintiff, then and still being a resident of the state of *Massachusetts*.) After which defendants proceeded to carry on the banking and express business under the firm name of *Adams & Co.*, and still continue so to do; that plaintiff was dissatisfied with the agreement, but out of friendship to defendants, with whom he had previously been connected in business, was reluctant to disavow the same, as he was led to believe it

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was a limited partnership under the law of this state, and he would not be liable for the debts of the firm, and as he then supposed his agent had acted in good faith. He therefore abstained from a public disavowal of the agreement, but by letters, to defendants, protested against the same, and insisted that it should be set aside. That although he, plaintiff, may be bound to the creditors of the firm, yet he insists he is not bound by the contract. That since the making of it he has been informed and believes, and so charges, that his agent in making the contract, did not act in good faith, but without the knowledge of the plaintiff, and in violation of his duty, received from the defendants, or one of them, a large gratuity for himself, as a consideration for entering into the same. That defendants are still conducting the business in his name, and have created liabilities that exceed one million of dollars, which are liable to be increased.

The amended complaint somewhat changes and enlarges the allegation of fraud and deception.

Now courts of equity will entertain jurisdiction and declare partnerships void, *ab initio*, where there has been fraud, imposition, misrepresentation or oppression, in the original agreement, and will appoint a receiver, etc. Where a partner has a right to dissolve the partnership, it is a matter of course to appoint a manager or receiver of the property. (*Collyer on Partn.*, §§ 360, 361, and note 7; *Story on Partn.*, §§ 6, 232, 285; *Gow on Partn.*, 3 ed., 107; *Edwards on Rec.* 136, 137; *Law v. Ford*, 2 Paige Ch. 310; *Martin v. Van Schaick*, 4 Paige, 479; *Howell v. Harvey*, 5 Ark., 278; *Tattersall v. Croote*, 2 Bos. & Pull. 131.)

If the allegations of the complaint are admitted to be true, it will scarcely be contended they do not disclose a proper case for equitable relief, and the remedial justice peculiar to courts of equity, and which courts of law are inadequate to afford. Then it may be assumed, upon the filing of the complaint, etc., an action was commenced of which this court had jurisdiction in equity, separate (according to the distinction made by the rulings of the supreme court) from law jurisdiction.

The prayer of the complaint asks for a dissolution, account, injunction, and receiver. Defendants, by a stipulation in writing, filed, as appears by the clerk's register, on the same day as was the complaint—which I remember to have seen, but have not found among the pa-

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pers—admitted the allegations of the complaint, and consented to the appointment of a receiver, which was made as heretofore stated.

2d. *Had the court legal authority to appoint the receiver; and what relation does the receiver bear to the court and property.*

The rule in equity is, as I have stated, the appointment of a receiver follows as a matter of course where there is a right to a dissolution. By our Practice Act, §143, subdivision 3, a receiver may be appointed in such cases as are in accordance with the practice of courts of equity jurisdiction. According to this practice, receivers are appointed at various stages of the suit, both before and after answer. *Edwards on Rec.*, 10.

Here the appointment having been made by consent, its regularity at this late day, cannot well be questioned. If it should be irregular, the remedy is by motion, in behalf of a party interested, to vacate the order. When the receiver was appointed, it was for the benefit of *all parties* who might establish rights in the action, or who had an interest in the fund in court. The property that went, or is now in his possession, is in *custodia legis* for whoever can make title to it. It is the court itself which has the custody and possession of the property; the receiver at common law, independent of any statute regulation, is treated as the officer and creature of the court, subject to its orders and entitled to its protection, and he cannot be disturbed by any person, even by a party or all the parties to the action, without leave of the court. (*Edwards on Rec.* 2, 3, and the numerous English authorities cited. *Green v. Bostwick*, 1 *Sand. Ch.* 185; *Noe v. Gibson*, 7 *Paige* 513; 3 *Paige* 199; 5 *Paige* 489; 1 *Paige* 558; 3 *Paige* 167; *Egbert v. Wood*, 3 *Paige* 517; 7 *Paige* 583; 8 *Paige* 565.)

The order appointing a receiver, followed up by giving the requisite security, is treated as an equitable sequestration of the property, which vests in him, as the officer of the court, without any assignment from its former owner—the object of the appointment being to preserve the property for those who may be entitled to it, that the court may ultimately make such disposition of it as will preserve the legal as well as the equitable rights of every claimant. (*Fairfield v. Weston*, 2 *Sim. & Stu.*, 96; *Mann v. Pentz*, 2 *Sand. Ch.* 257; *Willson v. Allen*, 6 *Barb.* 542; *Albany City Bank v. Schermerhorn*, 9 *Paige* 371, 377; *Edwards on Rec.* 83.

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It being the rule in equity that, when the court gains jurisdiction of a cause for one purpose, it retains it generally for relief. 2 *Johns. Ch.* 431; 10 *John.* 587; 17 *John.* 384; *Kemp v. Prior.* 7 *Ves.* 249; 10 *Barr.* 373; 12 *Barb.* 61.)

The property, when once in the possession of the receiver, cannot be disturbed; if it is interfered with, then it becomes the duty of the court to protect it, not only against acts of violence, but against suits at law. This it will do by its injunction or otherwise. Even an action cannot be brought against the receiver without leave of the court. *Edwards on Rec.* 125; *Brooks v. Greathead,* 1 *Jac. & Wak.* 176; *Angel v. Smith,* 9 *Ves.* 335; *Johns v. Claughton,* *Jacob Ch.* 572.)

The whole doctrine upon this branch of the case, as gathered from the above authorities, is succinctly and correctly given by justice *Hydenfeldt*, and concurred in by the other judges, in the opinion reported in 6 *Cal.* 113, quoted *supra* (See also *Adams v. Haskell & Woods,* 6 *Cal.* 316.

Equity jurisdiction in this action is not affected by the provisions of our insolvent law, and it is unimportant whether or no there was a special assignment by the parties to the receiver, *Cohen*. Sometimes, in case of real property, courts of equity have required a written assignment; but this is not deemed necessary. Plaintiff and defendants, being bankers, were denied the benefit of the insolvent law. All assignments made by insolvent debtors for the benefit of creditors, are declared void in this state; but it does not follow, that an equitable sequestration of property in an equity suit is an assignment by an insolvent debtor, within the meaning of the insolvent law; nor has it been held, that a judge, acting as chancellor cannot, in a proper case, appoint a receiver, and thereby vest a fund, during litigation, according to the jurisdiction and practice that has obtained in courts of equity. On the contrary, the supreme court, so far as it has indicated its views, adhere to the equity rule. In the case of *Groschen v. Page*, 6 *Cal.* 138, which went from this court, and involved the validity of an assignment for the benefit of creditors, the court says: "The firm was insolvent, and the only way in which the property could be disposed of was by bill in chancery, to distribute it ratably among the creditors."

The above outline of the facts, and general principles of law ap-

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plicable thereto, being disposed of, some propositions remain to be considered in order to determine the destination of the funds upon the decree of distribution.

3d. *Was the property in this action subject to attachment or garnishment at any time after it went into the hands of the legally appointed receiver?*

The recognised rules of law and equity, as above referred to are against it.

The supreme court, by its decision in this action (*ut supra*) when *Cohen* and *Jones* were before them, claiming exemption from the order of this court, directing them to pay over the fund to the new receiver, because it was attached in their hands, declared unanimously that it was not the subject of attachment.

Subsequently, January Term, 1857, in the case of the *County of Yuba v. Adams & Co.* and others, they recognised and adhered to the same principle; *Brummagin & Co.*, held as *bailees of Cohen the receiver in this action*, \$75,000. The county intervened, claiming to have a lien and judgment on the fund. The court says: "The fund being in the custody of the law was not liable to seizure: the only parties contesting are *certain creditors, who claim to have a lien upon the fund by reason of having attached it in the hands of Brummagin & Co.* It appears that the levy of such attachment was made whilst the fund was held by *Brummagin & Co.* as the *bailees of Cohen*; *a receiver duly appointed by a competent court was, under the former ruling of this court not liable to be attached.* It follows that the defendants" (the attaching creditors,) "have no lien upon the fund in dispute."

Efforts have frequently been made to reach, by attachments, money paid into court, or in the hands of officers of the law,—such as sheriffs, clerks, receivers, assignees in bankruptcy, administrators, etc., and numerous decisions are referred to in Mr. *Drake's* late work on attachments. As a general thing it has been held that funds in the hands of those officers are exempt from attachments. *Drake on Attachments*, §489, and authorities cited. In regard to receivers, the decisions are uniform—at least I have found no adverse authority.

If this fund is subject to attachment, could not the court from whence the attachment issued, under §§ 128, 142 Practice Act, compel its delivery to the sheriff? A court of equity might, in that event,

by proceedings at law, possibly in an inferior court, be compelled to yield its jurisdiction, and would not have the power even to order payment of the disbursements made under its authority for the protection of the fund.

By the records of the court it will appear that after *Cohen* entered upon the duties of receiver, various efforts were made to attach and obtain possession of the fund in court, by process issued out of, and proceedings had in the late superior court. Parties thus interfering, were by the judge then presiding in this court, held guilty of a contempt of court, and exonerated on condition of relinquishing their pretended claim to the fund. Should these parties, who, under the order of this court yielded their remedy, acquiesced in a principle of law then announced and afterwards promulgated by the highest legal tribunal in the state, now lose all claim to this fund, and some bolder or more fortunate parties be permitted to sweep it all, by the same provisional remedy they were denied? Would it be just or equitable, now to declare, to the mass of creditors, who have in good faith intervened, upon an order made for that purpose in this court, upon the authority of the supreme court, inviting them to present their claims—you have failed to attach the fund held by the court for your benefit, which you had authoritatively been told was not the subject of attachment, and cannot share in the distribution? This would indeed be keeping the word of promise to the ear and breaking it to the hope. To so hold seems to me would neither be consonant with law, which is said to be the embodiment of human reason, nor with equity, which in its true and genuine meaning is the soul and spirit of all law.

But it is contended that the supreme court by another decision—July term 1857, in the matter of this intervention of *Lynch* and others—made in this action, have in effect overruled the decisions previously made, and settled the law upon this point contrary to the doctrine as theretofore announced. I do not so understand the opinion or judgment. I consider it the duty of this court to follow the authoritative decisions of the supreme court: they are imperative instructions to which any adverse views entertained by this court must yield. This decision in the matter of *Lynch* was upon writ of error: the judgment removed I am informed of; the transcript or return to the writ of error I did not see or certify; nor to my recollection was it made under the direction of this court. I am therefore uninformed as

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to their contents, and do not know who among the creditors or parties had notice of the writ or appeared therein.

In the *English* and *United States* courts the practice on writs of error are to some extent regulated by statute. In this state we have no statutory provisions—an appeal only being provided for—and the common law must be our guide. In *England* the writ issues out of the court of chancery on final judgment in common law and not in equity cases, and removes only the record. It does not lie for error in fact. The return is made by a transcript and the original, taken by a judge in person, or by a transcript certified according to practice which is not the same in all the courts. Now I must presume this writ of error was regularly issued, and that all proceedings under it were regular and in due form, and I only have referred to it in this connection with a view of determining by the general law and by the judgment and record removed, and the judgment of the supreme court thereon, what was decided and what are the instructions by the decision to this court.

The judgment removed is referred to in the opinion of the court as follows: that the court “permitted the intervention to be filed, but refused to stay proceedings or afford affirmative relief.”

The record, directly connecting itself with the judgment, was the complaint of intervention and answer thereto, and I suppose this record was before the supreme court. It must be remembered, previous to the writ of error, no trial or hearing had been had before this court upon the intervention; that, as the judgment reads, was refused.

The law did not require the whole proceedings in this action to be sent up, and I cannot infer from the fact that a writ of error issued to remove a particular judgment, affecting the intervenors, that the whole proceedings were before the court. I am supported in my conclusions by the opinion of the court, and some expressions therein contained. In the opinion, no allusion is made to the entry of the default—the order of reference to take an account of all claims, (including those of the intervenors,) or the report of the referee thereon and its confirmation, all which had transpired before the writ of error was issued or returned.

In the opinion, the court says: “The proceedings are under the control of the partnership alone, and may be dismissed at the will of the party.” * * * * *

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"The creditors are not parties. It is a suit between the members of the partnership, and until a decree of dissolution, the plaintiff may deal with it as he pleases."

Now, it appears here of record that at the time the writ of error was presented to this court, and the judgment it removed was entered, there was a default and a decree of dissolution, and that the creditors, to the extent of more than one and a-half millions of dollars had intervened, and had their claims audited and allowed, under the authority and order of the court; and among them will be found many, if not all, of those who have filed special complaints of intervention. These facts could not have been before the supreme court.

Again, and in conclusion, the court says: "For the purpose of this investigation, it makes no difference whether the appellant obtained his judgment before the decree of dissolution; for, if the proceeding was instituted for *the purpose* of hindering, delaying or defrauding creditors, it may be attacked on that ground at any time before a final distribution of the assets."

Now, the only evidence of any such purpose as is mentioned, before the court, was the allegations contained in the pleadings. The intervenors had introduced no proof in support of the allegation of fraud, or as to the time, or manner of levying their attachments; and the record contained none.

The decision of the court, as I understand it, is to this effect: The judgment removed from this court is reversed, and the intervenors are entitled to be heard upon their complaints of intervention. I have carefully considered it with a view of treating it with respect, and performing my duty herein; and I am unable to come to any other rational conclusion. I cannot suppose or find anything in the opinion to warrant the conclusion here claimed, that the court intended to instruct this court that the intervenors are entitled to be paid what they claim by their intervention, and without proofs, when it has been made to appear that at the time their alleged attachments were made, the fund claimed was in the custody of this court in an equity suit pending and undetermined.

4th. *What standing in the action and before the court, have the special intervenors, and to what relief are they entitled?*

The plaintiff, in his complaint, asks that the partnership assets be distributed among the creditors; to this no objection is interposed by

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the defendants. The order of reference was made for all the creditors to appear and prove claims, etc., to enable the court to carry into effect one of the objects of the action. The order was general, and applied to all and every kind of claim whether or no it was entitled to preference or priority. Those who then appeared and proved their claims, are in the position of intervenors, by the express order and consent of the court. The special intervenors had the same rights and privileges in regard to notice, etc., as had the mass of the creditors. I have not examined the entire list of the creditors and claims contained in the voluminous report of the referee, but have done so sufficiently to ascertain that at least a majority in interest of the special intervenors did appear and have the same claims audited, which are set forth in their special interventions. Is not this an election of remedy by which they are concluded? By their complaints they neither join with the plaintiff in claiming what is sought, nor with the defendants in resisting; nor do they demand anything adversely to both. They claim to be creditors with special liens, which entitles them to preference of payment out of the partnership assets. These liens as they have shown, were acquired since the commencement of plaintiff's action and while the fund was in the custody of the court for the purpose of distribution. Neither plaintiff or defendants have any pecuniary interest in the interventions—as against them they are nugatory—the only parties to be affected by them are the mass of creditors, made parties under the order of the court, among whom are at least a portion of the intervenors. If we should desire to indulge in the niceties of reasoning, the interventions might, to some extent, be regarded as interventions against the intervenors themselves and the creditors at large. The creditors, however, have not been served, and strictly are not bound to notice the interventions.

In the matter of *Holling, Hurtell* and others, and that of *Wainwright*, the complaints were filed and referred on the same day, on motion of the intervenors therein, without service or answer of any kind, except as is contained in the facilitating stipulation of the plaintiff's and defendant's, attorneys. The creditors do not appear to have had any part or voice in the matter. The court will not allow the plaintiff or defendant to stipulate away their rights, if it is claimed that the stipulations are of such effect. No proofs in the case of either intervention have been introduced to sustain the charges and allegations

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of fraud. Should this court, then, pronounce that the plaintiff has fraudulently instituted this suit, for the purpose of hindering, delaying or defrauding creditors, when the parties have voluntarily surrendered their property to the control of the court and asked that it be distributed among their creditors, and that the mass of the creditors, who are in no way implicated, should be punished by this suspicion of fraud, to such an extent as would be equivalent to depriving them of all participation in the fund?

The acts of the parties and the allegations in the plaintiff's complaint, in the absence of proof, ought to rebut any presumption of fraud against them, and as for the mass of the creditors, they are not charged with or implicated in the fraud. But I am unable to discover upon any principle of justice, how fraud, if clearly proven, could give to the intervenors a right to attach a fund in court, or obtain a preference of payment over the other creditors. If there has been a fraudulent combination or confederation between the parties, or any of them, and the receiver, *Cohen*, or any other officer, does it result as a consequence that all the creditors, except the intervenors, must suffer? If these allegations of fraud are true, the remedy is against the receiver and upon his official bond, for any violation of duty whereby the fund has been diminished, or the estate defrauded.

In connection with this branch of the case, it may be noticed that the validity of the attachments in other respects is not beyond question. It has been held in this court, and elsewhere that an attachment is a *remedy* not a *lien*, to be pursued according to the requirements of the law, whereby a security is obtained for the satisfaction of any judgment that may be recovered. The statute regulates the whole proceeding; the making the levy; taking the property when it can be done; how it may be released; the proceeding when possession cannot be obtained; examination of the party, and order of court to compel delivery to the sheriff; the sale and appropriation by that officer, upon judgments according to priority, etc., are all specially defined. Upon the report of Mr. *Haight*, and by the attachments themselves, it is not clear that the intervenors have pursued their remedy according to the requirements of the statute.

If, however, they have done so, can they not enforce and perfect it, under the provisions of the act, in the courts from whence the writs issued, aided if necessary, by the judgment of the supreme court on

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appeal? It is true, courts of equity will sometimes settle preferences and liens in cases of conflict, when there is no other mode of doing it; but this is not a suit originating out of a controversy of such a nature. If the property was in the custody of the court at the time it was attached, should not the consent of the court have been first obtained; or was it necessary to garnishee the court? It was not a proceeding *in rem*, inasmuch as the officer did not get possession of the property. Most of the attachments were served on *Cohen*; by the statute he became liable personally for the moneys, etc., in his possession; he, by order of the court, transferred the property to the assignees, and the assignees again to *Naglee*. Did the liability, *ex-officio*, go with the transfer, and did *Naglee*, *ex-officio*, become liable?

The following conclusions are supported by the authorities, and in my opinion are inevitable:

That the fund and property in the custody of the court in this action was not the subject of attachment in the hands of its duly appointed receiver.

That the special intervenors have no lien by attachment, judgment or execution upon the fund in court in this action, as claimed in their complaints which entitles them to priority of payment out of that fund.

That the substantial allegations of the complaints of intervention are not proven, and that the other creditors made parties by the order of reference, and report thereon, to take an account of claims, etc., are not affected or bound by anything therein contained.

5th. *It remains to be determined what should be the order and decree of distribution.*

By the reports on file and confirmed, it appears there is a balance of \$50,000 now in the hands of the receiver ready for distribution. That there is also about the sum of one hundred thousand dollars belonging to the fund in litigation, besides a claim against a former receiver, bills receivable, etc.

The decree should be final as to the distribution of the whole fund so that there will remain nothing to be done but to make the payments according to the decree, as the funds may now be, or may hereafter become, ready for distribution.

As I have heretofore stated, it is a doctrine of courts of equity, that when the court has gained jurisdiction of a cause for one purpose, it usually administers general relief. Actions may be instituted for the

purpose of settling preferences of payment and priorities among existing liens in cases of conflict, and where there is no other safe or convenient remedy. In such cases and generally, says Mr. Story (1 *Eq. Juris.* §§ 553, 554,) in the course of the administration of assets, courts of equity, according to the maxim, *Æquitas sequitur legem*, follow the same rule in regard to legal assets which are adopted in courts of law. In like manner they recognise and enforce all *antecedent liens* and charges *in rem.*, according to their priorities. Equitable assets as a general rule, are distributed equally and *pari passu* among the creditors, without any reference to the dignity or priority of the debts; for courts of equity regard all debts in conscience as equal, *jure naturali*, and equally entitled to be paid; and here they follow their own favorite maxim, equality is equity, "*Æquitas est quasi æqualitas.*" If the fund falls short all the creditors are required to abate in proportion.

Says chancellor Kent (*Moses vs. Mugatroyd*, 1 *John Ch.* 130.) "the general doctrine is to encourage as much as possible the idea of equitable assets, because equality in the payment of debts is equity, and the rule of distribution in chancery, is founded on principles of natural justice. When the assets are considered as equitable, then it is well and uniformly settled that they are to be distributed among all the creditors, *pro rata*, without giving preferences."

If the intervenors had legally levied their attachments before the property went into the custody of the law, equity would recognise and reward their superior diligence; but, when the act by which they claim to have obtained their priorities was in violation of law, in contempt of the authority of this court, and, I am almost inclined to say, an inequitable attempt to exclude the mass of the creditors from sharing this fund, it would be well to recall the maxim, which, as has been said, lies at the foundation of equity jurisprudence—"He who seeks equity must do equity."

The fund in court is all partnership property. I believe there have been no debts proven against the individual members of the firm, but all are against the partnership; there are no priorities or preferences in other respects among the debts allowed, and no liens upon the funds in court; it matters not, therefore, whether the assets be deemed legal or equitable, for in either case, according to the equity rule, they must

be distributed *pro rata* among all the partnership creditors whose claims have been reported and confirmed under the orders of this court, to the extent that they have been confirmed. After paying these, the individual debts of the partners should next be paid if any there be, etc.

This will be placing all the creditors upon an equality, and in the same position they were when this fund went into the possession of the court. This, according to my views, is equitable and just to all, and wrong to none; and to see justice prevail, is the only object that has induced me to give this matter this extended consideration.

Should I be in error the whole case will be in condition for review, upon the whole facts and proceedings, before the supreme court, where by its decree the various questions arising may be settled, and the decree of this court be modified or a new one ordered as may be deemed equitable and just, which will be a final determination of the order of distribution.

I found this action pending—a legacy from my predecessor—when I entered upon this office. It has progressed slowly and been attended with great delays which, as the records will show are not chargeable to the court. In its various proceedings and ramifications it has entailed upon the court a great deal of labor and investigation; without, on many occasions, the assistance of counsel, whilst the parties who are interested and awaiting the result may be counted by hundreds. In behalf of the court, I can say when the various matters have been submitted for decision, I have disposed of them within a reasonable time, as soon as the current business of the court allowed me opportunity for examination.

Opposition, appeals, difficulties and embarrassments have attended most of the orders and judgments of the court made in this action; sometimes to compel obedience to them has involved the performance of unpleasant duties, and the exercise of extreme remedies which were calculated to engender bitter and resentful feelings. In those matters as well as in announcing this opinion, I have acted from a sense of justice and in discharge of what I considered a duty.

A decree of distribution ordered as is herein indicated.

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GASKINS vs. GASKINS.*

Twelfth District Court for San Francisco Co., November, 1857.

DIVORCE—EXTREME CRUELTY—BODILY FEAR.

Extreme cruelty is such conduct on the part of either husband or wife, whether manifested by words or acts or both, as by the common understanding and judgment of mankind, living in civilized societies, ought not to be borne by the other party. In an action for a divorce by a wife, on the ground of extreme cruelty, it is sufficient that she should prove repeated, deliberate, and groundless imputations by the husband in the presence of others, against her chastity.

It is not necessary that *any one act* amounting in itself to extreme cruelty, should be proven; an accumulation of acts of an harsh and annoying nature, may be sufficient to sustain an action on that ground.

Condoned acts of cruelty will be revived by subsequent harsh treatment.

Threats of bodily injury, in the event of the subsistence of the marital relation, are proper to be considered in deciding an issue of extreme cruelty.

Action for a divorce brought by a wife on the ground of extreme cruelty on the part of the husband. The evidence established that he had repeatedly, in the presence of others, charged her with a want of chastity, and had, on at least two occasions, inflicted bodily injury, though of rather a slight character, upon her. That they had been married about nine years, and had two children. That she had left him once, leaving the children with him, and subsequently at his solicitation, returned; that she afterwards left him again, on this occasion taking the children with her, and repeatedly refused to return; that since this last separation he has frequently threatened to inflict bodily injury upon her, and to shoot her if the opportunity should ever be presented; that he has also upon various occasions, repeated the above charges, and once under aggravated circumstances, assaulting her publicly in the street at the time, and accusing her before the crowd, whom the incident attracted.

No evidence was introduced on the part of the defense.

S. H. Brodie and *G. F. & W. H. Sharp*, for plaintiff.

Pixley & Smith, for defendant.

*See *supra* *Pursley vs. Pursley*, 51.

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S. H. Brodie, to show that subsequent ill-treatment would revive condoned cruelty, cited *Whispell vs. Whispell*, 4 *Barb.*, *S. C. R.*, 217, 221; *Evans vs. Evans*, 2 *Haggart, Ec. R.* 70, and 2 *Barb. Ch. Prac.* 262, and authorities there cited. That threats without an actual assault, constitute extreme cruelty. *Harris vs. Harris*, 2 *Phillim.*, 111; *Evans vs. Evans*, *supra*. That the language used by defendant, *per se*, constitutes extreme cruelty; *Whispell vs. Whispell*, *supra*.

F. Pixley argued *contra* generally, that the facts proven did not substantiate the charge relied upon to obtain the divorce. Three issues were framed to be passed upon by the jury:

First.—The substantiation or otherwise of the charge of habitual intemperance preferred against the defendant.

Second.—that of extreme cruelty; and

Third.—Of a counter charge of infidelity against the wife.

The introduction of proof upon this third issue was expressly abandoned by counsel for the defendant upon the commencement of the trial, as was also that upon the first, by counsel for plaintiff, leaving the second, that of extreme cruelty, as the only one to be passed upon by the jury.

NORTON, J.—*Gentlemen of the Jury*: The statute of this state regulating the subject of divorces, authorises them to be granted in various cases in which, in a large number of the other states, they are not permitted. Here they are allowed absolutely where the husband, being of sufficient ability to support the wife, neglects so to do, where either party is guilty of habitual intemperance, or extreme cruelty towards, or wilfully deserts the other—causes which, in the majority of the other states, will only authorise a divorce from bed and board. For this reason reported cases of divorce on the ground of extreme cruelty are not very numerous, and these are usually decided by a judge without a jury, in which his conclusions upon the facts are given instead of definitions or rules of law for the instruction of juries; and hence we do not find in adjudicated cases a clear definition of that which constitutes extreme cruelty, and which is exactly applicable to these words as used in our statute, and can be considered as determining that act or combination of acts, which, under its provisions,

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will authorise a divorce. There is but little difficulty in deciding whether certain facts do or do not amount to extreme cruelty, but there is great difficulty in giving a general definition of extreme cruelty; perhaps, however, it may be said to be such conduct on the part of one of the parties, whether manifested by words alone, or by personal violence, or by both, as by the common understanding and judgment of mankind, living in civilized societies, ought not to be borne or tolerated by the other, which is probably as near a definition as the court can give, to aid you in coming to a conclusion upon the point. Formerly it was said that *language alone* could not constitute extreme cruelty; that to sustain this charge, there must be some act of personal violence committed, such as beating the wife, or otherwise severely maltreating her. In modern times, the rule becoming gradually relaxed, this doctrine has been denied, and words alone of an insulting, opprobrious and injurious character, have been declared to constitute of themselves, extreme cruelty. There are two points in this case which you should properly consider separately: *first*, the acts complained of, committed by the husband towards his wife *before*, and *secondly*, those committed *after* her separation from him. With regard to these latter, you should, in determining the character of their bearing upon the case, and the importance or otherwise to be attached to them, very carefully weigh and consider the surrounding circumstances. I do not charge you that you must disregard them altogether, but that you should be cautious not to forget the circumstances attending them, and the position of the parties at the time of their commission, as working a palliation or otherwise so far as they are concerned.

The first act of violence complained of, and in proof of which evidence has been introduced, was that which occurred in October, 1853. This was afterwards forgiven, not necessarily in express language, but by the mere fact of the subsequent cohabitation, by which the law presumes forgiveness, but annexes the condition of proper conduct and kind treatment on the part of the offending party for the future, and a non-compliance on his or her part with this implied condition, has the effect of nullifying the implied forgiveness, and remitting the injured party back to the original injury, that is, that subsequent acts of the same kind, revive condoned cruelty, or in other words, make the acts complained of continuous and connected, and as though the

forgiveness had never been granted. So that in taking into consideration this first fact, in connection with the others which have been proven, you are to disregard the intervening forgiveness, and to determine whether or not *all* the facts taken together, unitedly amount to the extreme cruelty of which plaintiff complains.

Sometimes a single act of and by itself, is extreme cruelty; as where the husband should severely beat his wife, or otherwise inflict a serious bodily injury upon her. But an accumulation of acts, all of an unkind, harsh or cruel character, but none of which would, by itself, authorise a divorce, may, when considered together, constitute extreme cruelty. And also, when the mere *acts* complained of would not, by themselves, even when considered together, authorise the relief sought, yet the *words* and *language* by which they may have been accompanied, must be also considered, and if of a character to wound the sensibilities and hurt the feelings, they may, in connection with the acts, make out the charge of extreme cruelty. In the present case the defendant has frequently used coarse and offensive language towards his wife, and has repeatedly given vent to imputations against her chastity. Some indulgence is due and must be shown to every one on account of infirmity of temper, which may palliate, and even excuse a coarse, harsh or insulting expression towards his wife, hastily expressed under aggravating circumstances; but where it takes the form of a deliberate charge, and that of the character which I have mentioned, is spoken in the presence of witnesses, and habitually repeated, then such acts constitute extreme cruelty. If you should conclude from a full consideration of the evidence, that the acts charged against the husband as having been committed before the separation do not sustain the issue presented to you, you are then at liberty to consider the subsequent acts. But in determining the proper weight to be attached to these, you must, as I have already stated, take well into consideration the surrounding circumstances—the fact that the plaintiff was then living separate from her husband, and that she had refused to return, and that he was not permitted to see her or the children whom she had taken with her. It is proven that he has threatened to commit bodily injury upon her, to cowhide her, and to shoot her whenever he should find the opportunity. The testimony upon this particular point, however, should be received with some degree of caution on account of the

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nature of the subject to which it refers. Had he said that he would cowhide her if she did not return home or something to that effect, it would be a very different thing from a threat to cowhide her at all events if the opportunity should present itself, while yet the difference in the actual remarks themselves, is not so great that auditors would necessarily notice it, or might not readily mistake one for the other in their recollections of them narrated sometime afterwards. However, you are to judge how far these *threats* manifest such an *intent* upon his part to *carry them into execution* as would warrant, or give her *reasonable cause to fear their actual infliction*; and can take those threats into consideration with the other facts in deciding the issue of extreme cruelty, which has been submitted to you.

As to the first and third, they having been framed and submitted, must be passed upon by you, and there having been no testimony introduced in support of either of them, you will in both instances, find negative answers.

The jury found affirmatively as to the second issue, and negatively as to the first and third.

BADGER vs. SCANNELL.

Twelfth District Court, for San Francisco Co., November, 1857.

SHERIFF—ASSIGNEE.

An outgoing sheriff cannot be compelled to transfer papers and effects to his successor in office, by order of court, made in particular cases.

A sheriff cannot be removed from the office, or trust of assignee in insolvency, upon an allegation of the insolvency of himself and of his official bondsmen, either before or after his term of office as sheriff expires.

The facts are fully given in the opinion.

A. P. Crittenden, for plaintiff.

McDougal and Sharp, for defendant.

NORTON, J.—This is an alternative application made by Badger, an

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insolvent debtor, and Doane, the present sheriff of this county, to have the property of the former, now in the hands of Scannell, the preceding sheriff, who holds them as assignee transferred, to Doane, or some other assignee; the first branch of the motion being based upon the right of Doane to take them as Scannell's successor in office; and the second, upon the alleged insolvency of Scannell and his sureties.

It is not necessary to decide whether Doane has the right he claims, because if he has, it must be enforced in the ways prescribed by law to enforce the transfer of all other papers and effects by the outgoing to the incoming sheriff. It cannot be effected by an order of court in each case pending.

On the other branch the motion must also be denied, because the fact of insolvency is denied by affidavits, and if this had not been so, I think this court has no power to grant the relief asked. The sheriff is liable on his official bond of sheriff, and does not give special bonds in insolvency cases, as other assignees do. This bond is the only security required by the insolvent law. If his official bondsmen become insufficient, he may be required to renew them, or be removed from office, but he cannot be partially removed by depriving him of the right to exercise a part of his functions. If this remedy is ineffectual in case the term of office has expired, the defect exists in the insolvent law, and is beyond the remedial power of the court.

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1. If property is sold while in the possession of the sheriff, by virtue of an attachment duly issued, the title which remains in the vendor will pass to the vendee, but subject to the lien created by the attachment, and in an action by the vendor, on a promissory note given to him in payment for the property so encumbered, the vendee cannot plead this lien as working such a failure of consideration as will entitle him to recoup the amount expressed on the face of the note, to the amount of the lien. To such a vendee the doctrine *caveat emptor* applies. *Selby vs. Riley.* 244

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9. If the husband should desert the wife, she is entitled to select her own domicile, and it is required of her to obtain a residence of sufficient time in this state, to sue for a divorce. She cannot claim her husband's residence here as her own, if it appear that she has selected another for herself. A want of support on the part of the husband must be proved to be wilful, and not merely the naked fact of neglect. *Travers vs. Travers.* 177

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 6. Where the foundation for the introduction of secondary evidence to prove the contents of a lost note, is laid by the introduction of the affidavits of interested parties, the case must be proven before the jury by primary or secondary testimony as fully as if the affidavits had not been introduced. *id.*
 7. Under the statute of this state, requiring an action to be brought in the name of the real party in interest, for a foreign administrator to bring an action in his own name and then prove by a foreign judgment a debt due the estate of another, would be a fatal variance. *Lander vs. Smith.* 318
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SUPERVISORS, 1.

1. A direction to open a highway, though given by the board of supervisors, deflecting from the established line, could not change the highway. *People vs. Wray.* 50
2. A highway must be designated in width and be clearly defined. *id*

HOMESTEAD.

DEED, 4. MORTGAGE, 2.

1. There must be overt acts of dedication to family use, to constitute a right of homestead. *Cole vs. Pearce.* 40
2. A mortgage lien acquired on such property before such overt acts, will survive the right of homestead. *id.*
3. After the death of a wife without issue, the husband inherits the wife's interest in homestead, by right of survivorship. *Von Reynigom vs. Revalk.* 73
4. A mortgage executed by the husband alone on homestead property, and recorded during the life time of the wife, takes precedence of a mortgage executed on the same property by husband and wife, but not recorded until after the wife's death. *id.*
5. If a person leaves the state temporarily, the signature of the wife is necessary to convey the homestead, though she may be residing abroad, with the husband; but if he leaves permanently, it is not necessary. *Mitchell vs. Welden.* 160
6. The character of a homestead, having by residence been once possessed upon a piece of property, no act of the husband alone can deprive the wife of the interest she thereby acquired. *Sunderland vs. Griffiths.* 198

HOUSEHOLDER.

UNDERTAKING, 2.

HUSBAND AND WIFE.

ACKNOWLEDGMENT, 3. DIVORCE, 9, 11, 13. DOMICIL, 1. HOMESTEAD, 5, 6.

1. When a note and mortgage are executed to a husband and wife, to secure the purchase money of land sold by them which was common property, it raises no presumption that he intended the moiety of the note and mortgage as a gift or advancement to her, but the note and mortgage are common property. *Meyer vs. Kinger.* 326
2. Property acquired by a woman, by purchase during coverture, is held in common, and subject to her husband's right of disposal. *Amos vs. Griffin.* 348
3. Where property is conveyed to a wife by bill of sale, although purchased by her husband, the instrument must govern, and will not permit the presumption that the husband intended it as a gift to her. *id.*

IMPRISONMENT.

FRAUD, 3.

INDEMNITY.

BILLS, 13, 14.

INDICTMENT.

1. Where a defendant is not held to answer before the finding of the indictment, he may move to set it aside on any ground which would have been good cause for challenge either to the panel or any individual grand juror. *People vs. Corse.* 256

INJUNCTION.

DIVORCE, 5.

1. An order of injunction granted at chambers without notice to the adverse party, may be subsequently vacated or modified by the judge *ex parte* *Merced Mining Co. vs. Fremont.* 41
2. A state court has no right to enjoin the sale on execution of the United States courts. *Phelan vs. Smith.* 75
3. Where a party applying for an injunction to restrain the committing of waste by another, and in his bill avers an adverse title in the trespasser, an injunction cannot be granted. *Merced Mining Co. vs. Lockwood.* 192
4. An injunction will lie to restrain trespass in removing stones or other material from a quarry, where the averment shows that the substance of the realty is being destroyed, besides the irreparable mischief. *Hensley vs. Tarpey.* 211
5. Courts of equity will restrain certain acts of a municipal government by injunction. An individual tax payer can complain separately, of an injury common to him and all the other tax payers living under one municipal government, and by which he sustains no special injury. *Smith vs. Mayor of Sacramento.* 342

INSANITY.

COUNTY JUDGE, 1.

INSOLVENCY.

ASSETS, 1, 2, 3. ATTACHMENT, 1. PARENT AND CHILD, 3. SHERIFF, 6.

1. If an instrument drawn as a bill of exchange, and accepted, is described in the schedule in insolvency as a promissory note, and the parties properly referred to, it will be sufficient, though the holder may be unknown to the insolvent. *Lind vs. Heath.* 216
2. An insolvent omitting to state in his schedule that a creditor's name was unknown, and incorrectly describing the notes as payable to another person, is such an omission as will not bar the recovery of the debt after the insolvent has been discharged. *Judson vs. Atwill.* 217
3. Where an insolvent debtor mortgages all his property to one of his creditors, in order to secure the latter in the payment of his debt, and also to pay off the debts of other creditors for which he is liable as endorser, the transaction is not an illegal assignment under our insolvent law. *Dana vs. Stanford.* 269

INTEMPERANCE.

DIVORCE, 8.

INTEREST.

BILLS, 4.

JUDICIAL SALE.

See SALE.

JUDGMENT.

APPEARANCE, 1. CONFESSION, 1, 2, 3. REMITTITUR, 2.

1. When a judgment has been obtained five years previous, if the plaintiff moves the court for an execution, and makes the necessary affidavit, which the defendant denies, the court will refer the matter to take proof and report the same. *Cramer vs. Maguire.* 54
2. A sale under one judgment does not cut off the lien of a subsequent judgment until a deed is actually executed. *People vs. Vischer.* 98
3. Under what circumstances a judgment by default will be opened for excusable neglect. *Toomey vs. Knighton.* 118
4. The judgment entered by a justice in another township court, where the fact that the justice of that township court is prevented by sickness or other disability, as provided by the statute, from presiding at the trial, is not shown conclusively, will be set aside as void. *Travers vs. Bourdin.* 156
5. Unless a foreign court, when judgment was rendered, obtained jurisdiction of the person of defendant, it is of no efficiency in this state. *Goodrich vs. Green.* 167
6. A void judgment by confession will not be set aside on notice and motion of a party who has an action and attachment pending against the same defendant, but no judgment. *Cordier vs. Schloss.* 227
7. A judgment against a vessel will be offset against a judgment obtained by the owner of the vessel against the first judgment creditor. *Russell vs. Conway.* 335

JURISDICTION.

PARTNERSHIP, 3. TITLE, 1.

1. Implied consent will not transfer a cause from the superior court to the twelfth judicial district court. *Luning vs. Gorham.* 87
2. This state, in point of sovereignty and jurisdiction, has the same dominion over personal that it has over real property, actually situated within its territory. *Forbes vs. Scannel.* 132

JURY.

EVIDENCE, 5, 6. EXECUTION, 2.

JURY PANEL.

1. The panel list required to be signed by the

county judge, sheriff and county clerk, does not comply sufficiently with the statute when signed by the judge alone. *People vs. Corse*. 256

JUSTICE OF THE PEACE.

JUDGMENT, 4.

LETTERS TESTAMENTARY.

EVIDENCE, 3

LIMITATION.

1. The act of 1852 is retroactive in its operation, and only affects contracts existing at the time of its passage. *Bernheimer vs. King*. 106
2. Contracts which were mature and not outlawed on the passage of the act of 1855, can be prosecuted within two years after the passage of that act. *id.*
3. An endorsement of payment upon a note, uncorroborated by evidence, is not sufficient to prevent the statute of limitations from attaching. *Waldon vs. Haines*. 125
4. If a payment as endorsed was made before the partnership was dissolved, it was an implied admission of the debt, and the statute of limitations is no bar to its recovery; but if paid after the dissolution, there was no liability created upon the retired partners. *id.*
5. Where the last day allowed by the statute for bringing an action falls upon Sunday, the action must be commenced upon the preceding day, and not upon the day after. *Vertimer vs. Reichard*. 214

LOST WRITTEN INSTRUMENTS.

BILLS, 13, 14, 15. EVIDENCE, 2. EXECUTION, 3.

MALICE AFORETHOUGHT.

CRIME, 2.

MALICIOUS PROSECUTION.

1. Plaintiff cannot recover in an action for malicious prosecution, where the facts and circumstances would satisfy the mind of any one that an offense had been committed, and the person arrested was the probable offender. *Wood vs. Hamby*. 128
2. Advice of counsel will constitute probable cause, and be a good defense. *id.*
3. If the complainant be a lawyer, it is a fact for the jury to consider in their deliberations upon the advice of counsel. *id.*
4. In an action for maliciously arresting plaintiff in a civil suit, the complaint must show, either a termination of the former suit in favor of the present plaintiff, or his discharge from the arrest by order of the judge. *Roop vs. Humphreys*. 184

5. Where a person institutes criminal proceedings in order to compel the performance of a collateral thing, as to force a party against whom they are brought to pay a debt, in an action for malicious prosecution, it is not necessary to show either want of cause or malice by the prosecutor. *Sears vs. Hathaway*. 305

6. In an action of this nature, the "discharge by the committing magistrate is *prima facie* evidence of want of probable cause. *id.*

MANDAMUS.

1. A state court will not grant a mandamus to a state officer compel him to settle claims against the state. *Hovey vs. Whitman*. 252
2. Courts will not, by mandamus, interfere with the acts of an executive officer, unless the act commanded by law is so simple and so clearly defined as to take away all discretion, and make obedience a mere ministerial act. *Phelan vs. Whitman*. 262
3. Where a treasurer is prohibited by law from making disbursements until after claims shall have been approved by persons duly appointed to do so, a mandamus will not be granted to compel the treasurer to liquidate such a demand not approved. *People vs. Tillinghast*. 314

MASTER AND SERVANT.

DAMAGES, 5.

MORTGAGE.

ACKNOWLEDGMENT, 3. DEED, 6. EJECTMENT, 3. HOMESTEAD, 2, 4. FEME SOLE TRADER, 1. HUSBAND AND WIFE, 1. INSOLVENCY, 3.

1. When suit is brought by a mortgagee against a notary on his bond for an informal acknowledgment to a mortgage, whereby the lien was lost, if the notary plead a release to the mortgage, the defendant must deny the release as a forgery, under oath, by an affidavit filed in the cause, or it will be deemed admitted as genuine. *Fogarty vs. Finlay*. 1
2. If the mortgagee advances money to the mortgagor, for the express purpose of releasing or canceling a prior mortgage, made for the purchase money of the property, the second mortgagee becomes subrogated to the equities of the first, and this second mortgage is regarded as given for the original purchase money. *Carr vs. Vermuele*. 36
3. If a mortgage is given to secure several notes, they are to be paid *pro rata* from the avails of the property. *Hartly vs. Waterhouse*. 64
4. An assignment of one of several mortgage notes, will not ensure the full payment of them as they mature, leaving the last to meet the deficiency. *ib.*
5. A decree of foreclosure does not bar the equity of redemption in the mortgagor from acquiring a lien upon it at any time before the deed is executed to the purchaser. *People vs. Fischer*. 98

6. The description in a mortgage of the property thereby encumbered, must be sufficient, independently of anything *dehors* the mortgage, to apprise a subsequent mortgagee of the same property, of the intentions of the parties to the first mortgage, to charge the identical property: but the description must be fairly construed; and it is sufficient if the thing intended is clearly pointed out to a man of ordinary understanding, no matter what language may be employed. *Wagonblast vs. Washbrim.* 265

7. In the case of a mortgage of personal property, a delivery of the property is necessary to its validity as against a third person. *Richards vs. Schrader.* 267

8. But in case of a bulky article, such as a kiln of brick, a removal of the property is not necessary, provided there is an actual delivery of the property symbolical or otherwise. *id.*

NEW TRIAL.

1. Serving a notice of motion for a new trial, operates, *per se*, as a stay of proceedings for the five days within which a statement is to be filed. *Heslep vs. Brayton.* 86

2. A motion for a new trial need not be filed with the clerk of the court, it is only required to be served. *id.*

3. The court has the power to set aside the verdict of the jury in part, for good cause shown, and order a new trial upon that part alone which has been set aside. *Meyers vs. White.* 120

4. A party cannot rely on a motion for a new trial, upon the fact that a sale of real estate is void because it is not in accordance with the statute of frauds, when that objection was not taken at the trial, or pleaded in the answer. *Halleck vs. Guy.* 166

NOTARY PUBLIC.

MORTGAGE, 1.

1. It seems that a notary public is not responsible for a defective acknowledgment where the party or his attorney prepared the acknowledgment, and merely directed the notary to sign it. *Fogarty vs. Finlay.* 59

2. A party will not be allowed to recover damages against a notary public for an improper or defective acknowledgment, when he has exhibited on his part, an ignorance of the requirements of the law, and a want of diligence in being properly informed thereupon. *id.*

OFFICIAL BOND.

1. An action can be maintained on an official bond in the name of the state, for the recovery of moneys deficit in the treasury, though they belonged to the school funds, county funds, and other than state funds. *State vs. Marston.* 122

PARENT AND CHILD.

1. The general rule is that the father is entitled to the custody of the children, because it is supposed he is better capable of educating and supporting them. *Waltham vs. Waltham.* 146

2. Next to the right of the father, that of the mother must be recognized. *id.*

3. If the father is insolvent and unable to provide for the maintenance of the children, and the mother is possessed of property and with the children in her custody is properly supporting and educating them, the court will not interfere with that custody while an action for divorce is pending between the parties. *id.*

4. The court will take into consideration the abandonment of the family by the father, and the probable desire to annoy and harass the mother by this application, because she has applied for a divorce on the ground of desertion. *id.*

PARTITION.

SALE, 4.

PARTNERSHIP.

LIMITATION, 4. RECEIVER, 3. SALE, 4.

1. In copartnership, each partner ordinarily, in the absence of fraud on the part of the purchaser, has the *jus disponendi* of the whole partnership property. *Forbes vs. Scannell.* 132

2. Where a partner is absent so that he cannot be consulted, an assignment by a co-partner of the partnership property, in trust for creditors without preferences, if made in good faith for sufficient cause, and for the benefit of the firm, is valid and should be sustained. *id.*

3. After the dissolution of a partnership, one partner cannot, without special authority, authorize an appearance for the other partner in a court of justice; nor can service of process upon one of the partners of the late firm, give jurisdiction to enter judgment against the other. *Moore vs. Arrington.* 169

4. When a person purchases partnership property, subject to partnership debts, and a third person gives credit with a knowledge of this fact, the property will remain liable for the partnership debts. *Conroy vs. Woods.* 190

5. In this state in an action in equity, the district courts have jurisdiction to dissolve partnerships, and may declare them void *ab initio*, if there has been fraud, imposition or misrepresentation in the original agreement. *Adams vs. Haskell.* 362

6. Where a partner has a right to dissolve a partnership, it is a matter of course to appoint a manager or receiver of the property. *id.*

PARTY IN INTEREST.

EVIDENCE, 6.

PAYMENT. LIMITATION, 3, 4.

PRACTICE.

See ANSWER, DEMURRER, COMPLAINT, CONTINUANCE, NEW TRIAL. MORTGAGE, 1.

PRINCIPAL AND AGENT.

BAILMENT, 2, 3, 4. DAMAGES, 5, 6.

PROBATE COURTS.

ADMINISTRATOR, 1, 2. GUARDIAN, 1. SALE, 2.

1. The provisions of the statute authorizing probate judges to appoint guardians, are not in conflict with the section of the constitution vesting district courts with all the powers known to courts of equity. *In re Veder.* 246

PROMISSORY NOTE.

See BILLS AND NOTES.

PUBLIC OFFICER.

MANDAMUS, 2. SHERIFF, 2. UNDERTAKING, 5.

RECEIVER.

PARTNERSHIP, 5, 6.

1. It is necessary in an action by a receiver, that he should aver he represents the debt, or is authorized to sue for the same. *Crockett vs. Seale.* 150
2. A receiver has no authority *per se* to sue in his own name for a debt due the estate he represents. *id.*
3. It is contrary to good policy to allow receivers of partnership property to institute suits for the discovery of assets of the estate they represent, not claimed by the parties. *Delessert vs. Argenti.* 152
4. It is necessary it should be done by creditors to whom the benefit accrues. *ib.*
5. Receivers' accounts should show the amount of property and funds received, as well as disbursements made; and when presented should be verified under oath, as should also the accounts of assignees appointed under the insolvent law of this state. *Adams vs. Haskell.* 357
6. If a receiver has made a disbursement without the order of the court, the *onus* is upon him to prove that it was necessary, or resulted beneficially to the estate, before it will be allowed. *id.*
7. It a receiver prosecutes suits for debts without an order of court, and fails to recover, as a general rule he will not be allowed his costs and expenditures out of the fund in court. *id.*
8. The order appointing a receiver, followed up by giving the requisite security, is treated

as an equitable sequestration of the property, which vests in him as the officer of the court, without an assignment from the owners. *id.* 362

9. The receiver is for the benefit of all parties who may establish rights in the action. The property is in *custodia legis* for whoever can make out a title to it. It is the court itself which has its custody and possession; the receiver, at common law, independent of any statute, is the creature of the court, and cannot be disturbed by a party or all parties, without leave of the court. The court will protect the property in his possession from acts of violence or suits at law. *id.*
10. A receiver should not employ as his counsel the attorney of either of the parties to the suit. *id.* 357

RECORDER.

See COUNTY RECORDER.

REDEMPTION. MORTGAGE, 5.

REFEREE. EXECUTION, 3.

1. In an equity suit where some of the issues of fact were tried before a jury, and those remaining by order of court and consent of parties, referred to a referee with instructions to report the testimony, etc., it is illegal to change the referee without the consent of the court or all the parties interested. *Adams vs. Cohen.* 310
2. References of this kind are for the information of the court, to be considered in connection with the verdict in making a final decree, and judgment and the testimony should be reported in full in the form of depositions. *id.*
3. Inasmuch as the verdict of a jury in an equity case may or may not be adopted by the court as its finding, *semble*, that this doctrine may be applied to the report of a referee, or to any part thereof. *id.*

REMITTITUR.

1. What is the effect of the words "judgment reversed" and "cause remanded," in a remittitur from the supreme court. *Meiggs vs. Scannell.* 233
2. The clerk of the court should enter the judgment upon the remittitur of the supreme court, when it specifically directs the particular judgment to be entered; but if the supreme court require a modified judgment to be entered according to the opinion delivered, application should be made to the lower court to order such judgment. *Welch vs. Sullivan.* 356

REPLEVIN.

1. In an action in replevin, the only essential points are, that the defendant has in his possession property belonging to the plaintiff, which he wrongfully refuses to deliver up. The mode in which he obtained possession is immaterial. *Hayden vs. Davis.* 89

2. The finding in the case of a verdict in replevin, must recite the value of the property and the amount of damages for detaining the same, if the property be returned. *Meiggs vs. Scannell.* 233

RESIDENCE.

See DOMICIL.

SALARY.

1. The legislature has the power to reduce the fixed salary of a public office before the term of the incumbent expires. *Ezekiel vs. Mickle.* 79

SALE.

JUDGMENT, 2. NEW TRIAL, 4.

1. Judicial sales are not within the purview of the statute of frauds. *Halleck vs. Guy.* 166
2. Sales by order of the probate court are judicial sales. *id.*
3. Where all the stockholders are not present at a sale of corporation property, when such sale is for the advantage and benefit of absent stockholders, they are presumed to have knowledge of it, after a lapse of sufficient time. *Rush vs. Johnson.* 207
4. Where property has been sold under order of a court, to effect a partition of partnership assets, in which infant heirs are interested, a resale will not be ordered upon the offer of an advance of ten per cent. upon the amount brought by the property, if the transaction be free from fraud or surprise, or if the property has not been sacrificed. *Osgood vs. Hamilton.* 291
5. Where goods sold are in the custody of the bailee of the seller, and nothing remains to be done to ascertain the price, quantity, quality, or individuality, the sale and delivery is complete upon the giving of a delivery order upon the bailee, and an acceptance, and readiness, and ability on his part to comply with it. *Coleman vs. Gladwin.* 291

SAN FRANCISCO COUNTY.

VENUE, 3.

SCHEDULE.

ASSIGNMENT 3. INSOLVENCY, 1, 2.

SET-OFF.

JUDGMENT, 7.

1. A joint indebtedness cannot be a set-off as a defense to a separate indebtedness, nor a separate debt against a joint one. *Allan vs. Howland.* 63
2. In a bill filed by the owner of a vessel to obtain an off-set, a description of the vessel as "the property of the plaintiff," is a sufficient allegation of ownership. *Russell vs. Conway.* 335

SHERIFF.

FEEs, 2.

1. If a sheriff unlawfully take a prisoner out of his county, every continuous act thereafter is unlawful. *In re Holt.* 20
2. A deputy sheriff cannot be a purchaser at a sheriff's sale. *Hassinger vs. McCutcheon.* 39
2. A constable acting as a public officer, has a right, peaceably and without force, to enter premises in the discharge of his duties in serving his writ of attachment. *King vs. Murphy.* 179
4. Having attached property in certain premises, he is entitled to visit it unmolested, in order to maintain his custody, and he is at liberty to remove the property. *id.*
5. An outgoing sheriff cannot be compelled to transfer papers and effects to his successor in office, by order of the court made in particular cases. *Badger vs. Scannell.* 385
6. A sheriff cannot be removed from the office or trust of assignee in insolvency upon an allegation of the insolvency of himself, and of his official bondsmen, either before or after his term of office as sheriff expires. *ib.*

SLANDER.

1. The words "he would steal," are not *per se* actionable. *Penniman vs. Fiske.* 5
3. Charging a person with being "untrustworthy," authorizes the recovery of special damages. *id.*

STATUTE OF FRAUDS

See FRAUD.

STATUTE OF LIMITATION.

See LIMITATION.

STAY OF PROCEEDINGS.

NEW TRIAL, 1.

STREET REPAIRS.

1. In San Francisco notice must be given to the property holder to repair the street himself, before he can be held liable and his property siezed for any assessment by virtue of repairs made. *DeBridges vs. Hueston.* 81

SUMMONS.

1. A defendant upon whom personal service has not been obtained, in order to answer within six months after judgment, must show that he has a meritorious defense. *Morris vs. Marye.* 97

SUNDAY.

LIMITATION, 5.

SUPERIOR COURT.

JURISDICTION, 1.

1. Process issued out of the superior court of the city of San Francisco, and served upon a defendant residing out of said city, is a nullity for want of jurisdiction. *Chipman vs. Bowman.* 55

SUPERVISORS.

COUNSEL, 2. HIGHWAYS, 1.

1. The power given, under the act of 1855, to the boards of supervisors of the several counties, to lay out, control, and manage roads, etc., does not include the power to purchase roads already laid out by individuals or corporations. *Sacramento County vs. Rhodes.* 8
2. The board of supervisors cannot exercise greater authority than has been delegated, and such as may be absolutely necessary to carry into effect the delegated powers. *id.*
3. The supervisors have no power to purchase stock in a corporation. *id.*

SUPPLEMENTARY PROCEEDINGS.

EXECUTION, 3.

TELEGRAPH COMPANIES.

1. Telegraph companies must be regarded as common carriers of messages, and subject to most, if not all, the provisions of the common law of carriers. *Parks vs. Alta Telegraph Co.* 171
2. It seems that a telegraph company will be held liable for damages upon the wrongful transmission of a message. *id.*

TITLE.

1. The courts have no power to adjudicate upon the question of title, where the act necessary to be performed is a political act, and could not be performed by the judiciary. *Hensley vs. Tarpey.* 211

TRESPASS.

DAMAGES, 7. INJUNCTION, 4.

TRUST.

1. If a trust of real estate fails, or is for immoral purposes, it goes back to the donor or author of the trust. *Eldridge vs. See Yup Company.* 158

UNDERTAKING.

ATTACHMENT, 2.

1. A party in interest, if not a party of record, may be a surety in the action. *Meyer vs. Scannell.* 6

2. A householder as surety is only a permanent resident, and not necessarily the head of a family. *id.* 7

3. A bond executed by the sureties without the principal is good and valid. *Curtis vs. Richards.* 69

4. In an action on an attachment bond, the proof of damages should be limited to the costs and expenses incurred, and such actual damages as are the natural and proximate results of the authoritative acts, under the writ. *Lyon vs. Chappelle.* 209

5. Executive officers, being liable on their official bonds to those who may be damaged by their misconduct, they should be allowed, in cases admitting of doubt as to the construction of the law governing their acts, to put their own construction upon it, and abide the consequences. *Phelan vs. Whitman.* 262

VENUE.

1. The court will change the place of trial in a transitory action and remove it to the county where the principal transactions occurred. *Houston vs. Marsh.* 43
2. The fact that a fair and impartial trial cannot be had, must be clearly and positively established. *People vs. Bullock.* 163
3. The place of trial in an action for foreclosure is determined by the county, and not by the judicial district of the district court in San Francisco county. *Lanning vs. Gorham.* 176
4. A change of venue will not be granted on the ground of convenience of witnesses of one party, when it will work equal inconvenience to the witnesses of the other party. *Claveau vs. Mann.* 355

VERDICT.

NEW TRIAL, 3. REFEREE, 3. REPLEVIN, 2.

WASTE.

INJUNCTION, 3.

WIFE.

See HUSBAND AND WIFE.

WITNESSES.

VENUE, 4.

